Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and its Members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and its Members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

APPEAL FILED JUNE 19, 1972

PROBABLE JURISDICTION NOTED DECEMBER 11, 1972

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November 4, 1971	Filed—Complaint with Exhibits
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma," Plaintiffs,	)
versus	) No. CIV-71-696
The State of Oklahoma, ex rel., The Oklahoma State Personnel Board, and Nathan A. Sams, Chairman, A. E. Plume, Vice-Chairman, Tom R. Moore, Member, Raymond H. Fields, Member, E. W. Harper, Member, Joseph Turner, Member, and Mrs. John D. (Helen) Cole, Member, in their individual capacities and as members of the defendant, Oklahoma State Personnel Board; and Keith B. Frosco, Director of the Oklahoma State Personnel Board; and the Corporation Commission of the State of Oklahoma, Charles Nesbitt, Chairman, Ray C. Jones, Vice-Chairman, and Wilburn Cartwright, Member, in their individual capacities and as members of the defendant, Corporation Commission; and Larry Derryberry, Attorney General of Oklahoma, Defendants.	)

COMPLAINT

Come now William M. Broadrick, Jimmy R. Ury and Clive R. Rigsby, for themselves and for the class, "classified employees within the classified service of the State of Oklahoma," plaintiffs herein, and represent and show the Court as follows:

1. That plaintiffs, William M. Broadrick, Jimmy R. Ury and Clive R. Rigsby, are each citizens of the United

States of America and of the State of Oklahoma, and are employed by the defendant, Corporation Commission of the State of Oklahoma, an agency and instrumentality of the State created by Article 9, Section 15, Oklahoma Constitution; that the members constituting class are, for the most part, citizens of the United States and citizens of the State of Oklahoma, and employed by the several agencies of the State of Oklahoma pursuant to the Merit System of Personnel Administration Act of Oklahoma, 74 O.S. 1961, Sections 801 to 839, both inclusive, as amended, hereinafter called "Merit System Act."

2. That the defendant, Oklahoma State Personnel Board, is an agency and instrumentality of the State of Oklahoma created by Section 804 of the Merit System Act; that the defendants, Nathan A. Sams, A. E. Plume, Tom R. Moore, Raymond H. Fields, E. W. Harper, Joseph Turner, and Mrs. John D. (Helen) Cole are the Chairman, Vice-Chairman and Members, respectively, of the defendant Board; that defendant, Keith B. Frosco, is the Personnel Director and Chief Executive Officer of the Board.

3. That the defendant, Corporation Commission of the State of Oklahoma, is an agency and instrumentality of the State of Oklahoma, as set out in paragraph 1 above; that defendants, Charles Nesbitt, Ray C. Jones and Wilburn Cartwright, are the Chairman, Vice-Chairman and Member, respectively, of the Commission.

4. That the Attorney General of Oklahoma is named as a party defendant herein because the constitutional validity of a Statute of the State of Oklahoma is challenged herein.

5. That this is a civil class action brought on behalf of the plaintiffs, as well as on behalf of each and all other persons similarly situated who are classified employees of the State of Oklahoma within the classified service and therefore are so numerous as to make it impractical to bring them all before the Court; this action is brought to

enjoin the deprivation of the civil rights of plaintiffs and others similarly situated, and is authorized by 42 U.S.C., Section 1983, which provided:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

6. That defendants, and each of them, under color of 74 O.S. 1961, Section 818, are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States, which Statute purports to make it unlawful and a cause for dismissal for any classified employee to "take part in the management of affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." The full text of Section 818 is attached hereto and marked "Exhibit A."

7. That the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs' First Amendment rights of free speech, assembly and press.

8. That Section 818 is overly broad in that it abridges plaintiff's First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed.

9. That Section 818 is unconstitutionally vague, and reasonable men often differ, and may only guess at what activities fall within the broad prohibitions in the Statute.

10. That Section 818 denies the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction.

11. That Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification.

12. That Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that their vested property rights are subject to divestment without just cause or due process.

13. That plaintiffs, William M. Broadrick, Jimmy R. Ury and Clive R. Rigsby, by virtue of their employment with the State of Oklahoma, have acquired valuable vested property rights. The Merit System of Personnel Administration Act of Oklahoma, supra, vests said plaintiffs with rights of tenure during good behavior and the Oklahoma Retirement System Act vests said plaintiffs with valuable retirement benefits upon the condition that said plaintiffs be employed in good standing upon the date of their retirement.

14. That the defendants threaten to invoke the sanctions of Section 818 against said plaintiffs for certain alleged, but undefined, political activities of the plaintiffs, and the defendant, Oklahoma State Personnel Board, and its members threaten to order the defendant, Corporation Commission, and its members to dismiss plaintiffs from their employment pursuant to Section 818 which requires the defendant, Corporation Commission, to comply. The threats were communicated to each named plaintiff by three separate letters dated October 18, 1971, mailed to each named plaintiff by the defendant, Keith B. Frosco. True copies of the letters are attached to this Complaint and marked Exhibit "B"; that plaintiffs have no adequate remedy at law and the defendants will, if not enjoined by

this Court, undertake to affect the dismissal of plaintiffs from their employment, all under color of Section 818.

WHEREFORE, plaintiffs pray on their own behalf, and on behalf of all others similarly situated, that this Court enter its declaratory judgment herein, declaring 74 O.S. 1961, Section 818, unconstitutional and void, and that this Court issue its injunction prohibiting the defendants, and each of them, from proceeding under color of said Statute against the named plaintiffs and others similarly situated.

s/t Terry Shipley
119½ South Third Street
Noble, Oklahoma 73068 872-5111
Oklahoma City, Oklahoma 236-1200

s/t John C. Buckingham
Suite 1213, 100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiffs

Filed November 4, 1971

EXHIBIT "A"

§ 818. Discrimination and other prohibited acts.

No person in the classified service shall be appointed, to, or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

No person shall use or promise to use, directly or indirectly, any official authority or influence, whether pos-

sessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting the rights or prospects of any person with respect to employment in the classified service.

No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassi-

fied service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply.

EXHIBIT B

[Letterhead of Oklahoma State Personnel Board]

October 18, 1971

Mr. William M. Broadrick
821 Nancy Drive
Ada, Oklahoma 74820

Dear Mr. Broadrick:

On Friday, October 15, 1971, the Oklahoma State Personnel Board met in open session and voted unanimously that the following charges be made:

WILLLIAM M. (BILL) BROADRICK
Special Investigator (Corporation Commission), #4352

Mr. Broadrick knowingly violated the provisions of Title 74, O.S. 1961, Section 818, in that he took part in the management or affairs of a political campaign, and solicited and received campaign contributions.

Specifically, Mr. Broadrick participated in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones by:

(1) contacting other Corporation Commission employees seeking advice as to Commission employees who might "kick in" concerning the campaign,

(2) contacting other Corporation Commission employes seeking their referrals to persons who might assist in the campaign,

(3) directly soliciting money to be used in the campaign,

(4) directly receiving solicited money to be used in the campaign,

(5) directly receiving a contribution of money to be used in the campaign, and

(6) receiving and distributing campaign posters.

Therefore, in accordance with the appropriate parts of, and as generally provided in, Sections 818 and 833 of Title 74, O.S. 1961, you may within fifteen (15) day after receipt of this certified letter request a public hearing on the charges before the State Personnel Board.

If you should have any questions concerning the law, Rules or basic procedure, please do not hesitate to call on me.

Sincerely,

OKLAHOMA STATE MERIT SYSTEM

Keith B. Frosco, Director

KBF:mer

cc: Ray C. Jones, Commissioner, Oklahoma Corporation Commission

Wilburn Cartwright, Commissioner, Oklahoma Corporation Commission

Charles Nesbitt, Commissioner, Oklahoma Corporation Commission

[Letterhead of Oklahoma State Personnel Board]

October 18, 1971

Mr. Jimmy R. Ury
4816 Woodview
Oklahoma City, Oklahoma 73115

Dear Mr. Ury:

On Friday, October 15, 1971, the Oklahoma State Personnel Board met in open session and voted unanimously that the following charges be made:

JIMMY R. (JIM) URY
Motor Carrier Chief Enforcement Officer, #4224
Corporation Commission

Mr. Ury knowingly violated the provisions of Title 74, O.S. 1961, Section 818, in that he took part in the management or affairs of a political campaign.

Specifically, Mr. Ury participated in the 1970 re-election campaign of Corporation Commissioner Ray C.

Jones by contacting other Corporation Commission employees seeking their referral to persons who might assist in the campaign.

Therefore, in accordance with the appropriate parts of, and as generally provided in, Sections 818 and 833 of Title 74, O.S. 1961, you may within fifteen (15) days after receipt of this certified letter request a public hearing on the charges before the State Personnel Board.

If you should have any questions concerning the law, Rules or basic procedure, please do not hesitate to call on me.

Sincerely,

OKLAHOMA STATE MERIT SYSTEM

Keith B. Frosco, Director

KBF:mer

cc: Ray C. Jones, Commissioner, Oklahoma Corporation Commission

Wilburn Cartwright, Commissioner, Oklahoma Corporation Commission

Charles Nesbitt, Commissioner, Oklahoma Corporation Commission

[Letterhead of Oklahoma State Personnel Board]

October 18, 1971

Mr. Clive R. Rigsby
R. R. #1, Box 102-A
Ada, Oklahoma 74820

Dear Mr. Rigsby:

On Friday, October 15, 1971, the Oklahoma State Personnel Board met in open session and voted unanimously that the following charges be made:

CLIVE R. RIGSBY
District Office Assistant, Oil and Gas Conservation (Corporation Commission), #0117

Mr. Rigbsy knowingly violated the provisions of Title 74, O.S. 1961, Section 818, in that he took part in the management or affairs of a political campaign, and solicited campaign contributions.

Specifically, Mr. Rigsby participated in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones by:

(1) seeking out other Corporation Commission employees to assist in the campaign, and

(2) soliciting money to be used in the campaign.

Therefore, in accordance with the appropriate parts of, and as generally provided in, Sections 818 and 833 of Title 74, O.S. 1961, you may within fifteen (15) days after receipt of this certified letter request a public hearing on the charges before the State Personnel Board.

If you should have any questions concerning the law, Rules or basic procedure, please do not hesitate to call on me.

Sincerely,

OKLAHOMA STATE MERIT SYSTEM

Keith B. Frosco, Director

KBF:mer

cc: Ray C. Jones, Commissioner, Oklahoma Corporation Commission

Wilburn Cartwright, Commissioner, Oklahoma Corporation Commission

Charles Nesbitt, Commissioner, Oklahoma Corporation Commission

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

SEPARATE ANSWER OF THE DEFENDANT CORPORATION COMMISSION OF THE STATE OF OKLAHOMA; AND CHARLES NESBITT, RAY C. JONES AND WILBURN CARTWRIGHT, IN THEIR CAPACITIES AS CHAIRMAN, VICE-CHAIRMAN AND MEMBER, RESPECTIVELY, OF THE DEFENDANT CORPORATION COMMISSION.

Come now Defendants Corporation Commission of the State of Oklahoma; and Charles Nesbitt, Ray C. Jones and Wilburn Cartwright in their capacities as members of the Defendant Corporation Commission, and for their separate Answer to the Complaint of the Plaintiffs filed herein, state:

1. That these Defendants admit Plaintiffs' allegations in paragraphs numbered 1, 2, 3, 4, 6, 13 and 14 of the Complaint, except those portions of Paragraphs 6 and 14 which allege or imply that these Defendants threaten to dismiss Plaintiffs from their employment under color of 74 O.S. 1961, Section 818, but, to the contrary:

2. That these Defendants consider the Plaintiffs good employees and have not threatened to dismiss them, or any of them, and have no intention to dismiss them unless required to do so by a lawful order of an Authority authorized by law to compel these Defendants to dismiss Plaintiffs from their employment.

3. That the Defendant Oklahoma State Personnel Board has not furnished these Defendants with any details or information concerning the alleged violations of the Merit System Act other than the copy of the original notice of the general charges made by the Board, and these Defendants are not informed as to any specific violations which the Board may expect to prove; and these Defend-

ants deny that they solicited or encouraged the Plaintiffs to take part in any political activities at any time.

WHEREFORE, the Defendant Corporation Commission of the State of Oklahoma; and Charles Nesbitt, Ray C. Jones and Wilburn Cartwright, Chairman, Vice-Chairman and Member, respectively, of the Defendant Corporation Commission respectfully pray that this Court determine and declare whether or not 74 O.S. 1961, Section 818, is constitutionally valid and enforceable, and for such other relief as may be equitable and just in the premises.

t/ Jack Swidensky, General Counsel
for the Corporation Commission
of the State of Oklahoma

t/ Harvey Cody, Conservation Attorney
for the Corporation Commission
of the State of Oklahoma

ATTORNEYS FOR THE DEFENDANT CORPORATION COMMISSION OF THE STATE OF OKLAHOMA AND THE COMMISSIONERS IN THEIR OFFICIAL CAPACITIES.

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

ANSWER

Come now the defendants, ex rel., The Oklahoma State Personnel Board and Nathan A. Sams, Chairman, A. E. Plume, Vice-Chairman, Tom R. Moore, Member, Raymond H. Fields, Member, E. W. Harper, Member, Joseph Turner, Member, and Mrs. John D. (Helen) Cole, Member, as mem-

bers of the defendant, Oklahoma State Personnel Board; and Keith B. Frosco, Director of the Oklahoma State Personnel Board; and Larry Derryberry, Attorney General of Oklahoma, and for their Answer to the Complaint of plaintiffs state:

FIRST RESPONSE

Defendants admit the allegations of paragraph one (1) of plaintiff's Complaint.

SECOND RESPONSE

Defendants admit the allegations of paragraph two (2) of plaintiff's Complaint with the exception that A. E. Plume and Raymond H. Fields are now the Chairman and Vice-Chairman respectively of the Oklahoma State Personnel Board.

THIRD RESPONSE

Defendants admit the allegations of paragraph three (3) of plaintiff's Complaint.

FOURTH RESPONSE

Paragraph four (4) of plaintiff's Complaint does not require a response.

FIFTH RESPONSE

Defendants admit that plaintiffs' action is a civil class action and that it is impractical to bring all of them before the Court; defendants have no knowledge of the additional allegations in paragraph five (5) of plaintiffs' Complaint and are unable to admit or deny these allegations.

SIXTH RESPONSE

Defendants deny the allegations in paragraph six (6) of plaintiff's Complaint.

SEVENTH RESPONSE

Defendants deny the allegations in pargaraph seven (7) of plaintiff's Complaint.

EIGHTH RESPONSE

Defendants deny the allegations in paragraph eight (8) of plaintiff's Complaint.

NINTH RESPONSE

Defendants deny the allegations in paragraph nine (9) of plaintiffs' Complaint.

TENTH RESPONSE

Defendants deny the allegations in paragraph ten (10) of plaintiffs' Complaint.

ELEVENTH RESPONSE

Defendants deny the allegations in paragraph eleven (11) of plaintiffs' Complaint.

TWELFTH RESPONSE

Defendants deny the allegations in paragraph twelve (12) of plaintiffs' Complaint.

THIRTEENTH RESPONSE

Defendants have no knowledge of the allegations contained in paragraph thirteen (13) of plaintiffs' Complaint and are therefore unable to admit or deny these allegations.

FOURTEENTH RESPONSE

Defendants deny the allegations of paragraph fourteen (14) of plaintiffs' Complaint with the exception that letters were sent to plaintiffs individually by defendant State Personnel Board informing them that they were charged with prohibited political activity under Section 818.

FIRST DEFENSE

Defendants allege that all of the act and actions of each of the defendants herein named has been in accordance with the laws of the State of Oklahoma.

SECOND DEFENSE

Defendants specifically deny that any of the statutes cited in the plaintiffs' Complaint are unconstitutional.

WHEREFORE, the defendants pray that the plaintiffs' Complaint be denied, and that 74 O.S. 1961, §818, be declared valid and the Oklahoma State Personnel Board be allowed to proceed in accordance therewith.

Respectfully submitted,

LARRY DERRYBERRY
ATTORNEY GENERAL OF OKLAHOMA

s/ BY Paul C. Duncan
PAUL C. DUNCAN
ASSISTANT ATTORNEY GENERAL
CHIEF, CIVIL DIVISION

s/ BY Mike D. Martin
MIKE D. MARTIN
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR DEFENDANTS, THE OKLAHOMA STATE PERSONNEL BOARD, NATHAN A. SAMS, CHAIRMAN, A. E. PLUME, VICE-CHAIRMAN, TOM R. MOORE, MEMBER, RAYMOND H. FIELDS, MEMBER, E. W. HARPER, MEMBER, JOSEPH TURNER, MEMBER, MRS. JOHN D. (HELEN) COLE, MEMBER, AND LARRY DERRYBERRY, ATTORNEY GENERAL OF OKLAHOMA

Filed, December 10, 1971

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

PRERIAL ORDER

A pretrial conference was held in the above entitled cause before Honorable Luther B. Eubanks, Judge, on the 28th day of December, 1971. Terry Shipley and John C. Buckingham appeared a counsel for plaintiffs; and Mike Martin appeared as counsel for the defendants, The State of Oklahoma, ex rel., The Oklahoma State Personnel Board, and Nathan A. Sams, Chairman, A. E. Plume, Vice-Chairman, Tom R. Moore, Member, Raymond H. Fields, Member, E. W. Harper, Member, Joseph Turner, Member, and Mrs. John D. (Helen) Cole, Member, in their individual capacities and as members of the defendant, Oklahoma State Personnel Board; and Keith B. Frosco, Director of the Oklahoma State Personnel Board; and Larry Derryberry, Attorney General of Oklahoma; and Harvey Cody appeared as counsel for the defendant, the Corporation Commission of the State of Oklahoma, Charles Nesbitt, Chairman, Ray C. Jones, Vice-Chairman, and Wilburn Cartwright, Member, in their individual capacities and as members of the defendant, Corporation Commission.

NATURE OF THE PROCEEDINGS

This is an action by plaintiffs for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma," seeking declaratory and injunctive relief against the defendants based upon the allegation that certain portions of Section 818 of Title 74, O.S. 1961 (a part of the "Merit System Act") are in violation of the rights guaranteed to the plaintiffs by the Constitution of the United States. Subsequent to the filing of the Complaint herein, the parties by stipulation and agreement made it unnecessary that any preliminary injunctive relief be taken. Consequently, the relief which plaintiffs

request at this time is of declaratory and permanent injunctive nature.

JURISDICTION

It is stipulated and agreed that this Court has full jurisdiction of all parties and of the subject matter of this action, and that this matter should be tried before a three-judge panel, pursuant to the Federal Rules of Civil Procedure.

ADMITTED FACTS AND STIPULATIONS

Attached hereto, marked Exhibit "A" and made a part hereof are the admitted facts and stipulations entered into between all of the parties.

PLAINTIFFS' CONTENTIONS

Plaintiffs contend that the defendants, and each of them, under color of 74 O.S., Section 818, in pertinent part as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription, or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States. In more particularity, plaintiffs contend:

1. That the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiff' First Amendment rights of free speech, assembly and press;

2. That the above quoted paragraphs of Section 818 are extremely broad in that they abridge plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;

3. That the above quoted paragraphs of Section 818 are unconstitutionally vague, and reasonable men often differ as to their interpretation and may only guess at what activities fall within the broad prohibitions in the Statute;

4. That the above quoted paragraphs of Section 818 deny the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction.

5. That the above quoted paragraphs of Section 818 divest the plaintiffs Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;

6. That Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that their vested property rights are subject to divestment without just cause or due process;

7. That plaintiffs, William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, by virtue of their employment with the State of Oklahoma, have acquired valuable vested property rights. The Merit System of Personnel Administration Act of Oklahoma, supra, vests said plaintiffs with rights of tenure during good behavior and the Oklahoma

Retirement System Act vests said plaintiffs with valuable retirement benefits upon the condition that said plaintiffs be employed in good standing upon the date of their retirement;

8. That the defendants threaten to invoke the sanctions of Section 818 against said plaintiffs for certain alleged political activities of the plaintiffs, and the defendant, Oklahoma State Personnel Board, and its members threaten to order the defendant, Corporation Commission, and its members to dismiss plaintiffs from their employment pursuant to Section 818 which requires the defendant, Corporation Commission, to comply;

9. That plaintiffs have no adequate remedy at law and the defendants will, if not enjoined by this Court, undertake to effect the dismissal of plaintiffs from their employment, all under color of Section 818.

CONTENTIONS OF THE DEFENDANTS, CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CHARLES NESBITT, CHAIRMAN, RAY C. JONES, VICE-CHAIRMAN, AND WILBURN CARTWRIGHT, MEMBER, IN THEIR INDIVIDUAL CAPACITIES AND AS MEMBERS OF THE DEFENDANT, CORPORATION COMMISSION

The above defendants contend that:

1. They consider the plaintiffs good employees and have not threatened to dismiss them, or any of them, and have no intention to dismiss them unless required to do so by a lawful order of an authority authorized by law to compel aid defendants to dismiss plaintiffs from their employment;

2. The defendant, Oklahoma State Personnel Board, as of the time of the filing of the answer of the above named defendants herein, had not furnished the said defendants with any details or information concerning the violations of the Merit System Act other than the copy of

the original notice of the general charges made by the Board, and that said defendants were not informed as to the specific violations which the Board may expect to prove and that said defendants deny that they solicited or encouraged the plaintiffs to take part in any political activities at any time.

CONTENTIONS OF THE DEFENDANTS, THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, AND NATHAN A. SAMS, CHAIRMAN, TOM R. MOORE, MEMBER, RAYMOND H. FIELDS, MEMBER, E. W. HARPER, MEMBER, JOSEPH TURNER, MEMBER, AND MRS. JOHN D. (HELEN) COLE, MEMBER, IN THEIR INDIVIDUAL CAPACITIES AND AS MEMBERS OF THE DEFENDANT, OKLAHOMA STATE PERSONNEL BOARD; AND KEITH B. FROSCO, DIRECTOR OF THE OKLAHOMA STATE PERSONNEL BOARD; AND LARRY DERRYBERRY, ATTORNEY GENERAL OF OKLAHOMA

The above named defendants contend as follows:

1. That they specifically deny that they, or any of them, under color of 74 O.S. 1961, Section 818, are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States;

2. That they specifically deny that the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs First Amendment rights of free speech, assembly and press;

3. That they specifically deny that Section 818 is overly broad in that it abridges plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;

4. That they specifically deny that Section 818 is unconstitutionally vague, and reasonable men often differ as

to its interpretation and may only guess at what activities fall within the broad prohibitions in the Statute;

5. That they specifically deny that Section 818 denies the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction;

6. That they specifically deny that Section 818 divests the plaintiffs' Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;

7. That they specifically deny that Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that plaintiffs' vested property rights are subject to divestment without just cause or due process;

8. That as to plaintiffs' Contention No. 7, these defendants have no knowledge as to said allegations, and therefore are unable to admit or deny same;

9. That they specifically deny that plaintiffs have no adequate remedy at law;

10. That all of the acts and actions of each of the defendants above named have been in accordance with the laws of the State of Oklahoma;

11. Said defendants specifically deny that any of the Statutes cited in plaintiffs' Complaint are unconstitutional.

CONTESTED ISSUES OF FACT

The contested issues of fact relate to the alleged vagueness, over-breadth and chilling effect of the above quoted paragraphs of Section 818. It is admitted that these issues may be issues of combined questions of law and fact. To the extent that same are susceptible of evidentiary proof, evidence shall be introduced by plaintiffs thereon.

CONTESTED ISSUES OF LAW

1. That the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs' First Amendment rights of free speech, assembly and press;

2. That Section 818 is overly broad in that it bridges plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;

3. That Section 818 is unconstitutionally vague, and reasonable men often differ as to its interpretation and may only guess at what activities fall within the broad prohibitions in the Statute;

4. That Section 818 denies the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction;

5. That Section 818 divests the plaintiffs' Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;

6. That Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that plaintiffs' vested property rights are subject to divestment without just cause or due process;

7. That plaintiffs, William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, by virtue of their employment with the State of Oklahoma, have acquired valuable vested property rights. The Merit System of Personnel Administration Act of Oklahoma, supra, vests said plaintiffs with rights of tenure during good behavior and the Oklahoma Retirement System Act vests said plaintiffs with valuable retirement benefits upon the condition that said plaintiffs be employed in good standing upon the date of their retirement;

8. That the defendants threaten to invoke the sanctions of Section 818 against said plaintiffs for certain alleged political activities of the plaintiffs, and the defendant, Oklahoma State Personnel Board, and its members threaten to order the defendant, Corporation Commission, and its members to dismiss plaintiffs from their employment pursuant to Section 818 which requires the defendant, Corporation Commission, to comply;

9. That plaintiffs have no adequate remedy at law and the defendants will, if not enjoined by this Court, undertake to effect the dismissal of plaintiffs from their employment, all under color of Section 818.

EXHIBITS TO BE INTRODUCED

It is stipulated and agreed that the following exhibits may be introduced and admitted into evidence without identification:

1. A copy of the full text of Section 818 of Title 74 O.S. 1961, with underscoring of the paragraphs or language therein contended unconstitutional by the plaintiffs.

2. Any and all copies of Attorney General's opinions which either party may feel determine either issues of law or fact herein without identification or objection.

3. Copy of the opinion rendered by the Fifth Circuit, in the following case: Hobbs, et al v. Thompson, et al, in the United States Court of Appeals for the Fifth Circuit, No. 30704, Appeal from the United States District Court for the Middle District of Georgia, and dated September 16, 1971.

WITNESSES

Names and addresses of all witnesses shall be exchanged by the parties prior to the tenth day before trial date. Summaries of witnesses' testimony shall also be exchanged prior to the tenth day before trial date.

AMENDED PLEADINGS

Pleadings are amended to conform to the statement of the contentions of the parties contained in this Pretrial Order.

PROBABLE LENGTH OF TRIAL

The parties have agreed to limit witnesses, other than the parties, to not more than six (6) each. The probable length of trial of this case will be one-half (½) day.

This suit has been ordered for trial on January 20, 1972.

/s/ LUTHER B. EUBANKS
Luther B. Eubanks
United States District Judge

APPROVED:

s/ Terry Shipley
Terry Shipley

s/ John C. Buckingham
John C. Buckingham
Attorney for Plaintiffs

s/ Mike Martin
Mike Martin, Attorney for defendants, Oklahoma State Personnel Board and Larry Derryberry, Attorney General of Oklahoma

s/ Harvey Cody
Harvey Cody, Attorney for defendant, Corporation Commission of Oklahoma

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

STIPULATIONS

The parties hereto, and each of them, do hereby stipulate and agree to the matters and things set out below for the purpose of this trial only:

1. That Plaintiffs, William M. Broadrick, Jimmy R. Ury and Chive R. Rigsby are each citizens of the United States of America and the State of Oklahoma.

2. That each plaintiff is, and has been at all times material herein, an employee of the defendant Corporation Commission of the State of Oklahoma, an agency and instrumentality of the State of Oklahoma, herein called "Commission."

3. That each plaintiff is a classified employee of the State within the purview of the Merit System of Personnel Administration Act of Oklahoma, 74 O.S. 1961, Sections 801 et seq (1959), herein called "Merit Act."

4. The Merit Act is administered by the Oklahoma State Personnel Board, an agency and instrumentality of the State of Oklahoma, herein called "Personnel Board."

5. That there are approximately 20,000 classified employees of the State, and the employees of the Commission were included in the classified service on August 1, 1968.

6. On October 15, 1971, the Personnel Board initiated certain proceedings against each plaintiff, accusing them of taking part in the management or affairs of a political campaign contrary to the statute; and on December 1, 1971, the Personnel Board furnished more detailed descriptions of the charges by separate letters to each plaintiff. The letters are attached hereto, incorporated herein by reference and marked "Exhibit A."

7. That since the Complaint was filed in this cause, defendant Joseph Turner has resigned as a member of the Personnel Board; defendant A. E. Plume has been elected Chairman of the Personnel Board and defendant Raymond H. Fields is now Vice-Chairman of the Personnel Board. The other members of the Personnel Board are defendants Nathan A. Sams, Tom R. Moore, E. W. Harper and Mrs. John D. (Helen) Cole.

8. That the defendant Commission is composed of defendants Charles Nesbitt, Chairman; Ray C. Jones, Vice-Chairman; and Wilburn Cartwright, Member, and will be required to discharge each plaintiff from his employment if so directed by the Personnel Board in the manner and form precribed by that part of 74 O.S. 1961, Section 818, unnumbered paragraph 7, which provides:

> "* * * If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee, and the appointing authority so directed shall comply."

9. That 74 O.S. 1961, Section 819, declares violations of Section 818, supra, to be a crime and proscribes additional criminal sanctions as follows, to-wit:

> "Any person who willfully violates any provision of this Act or of any rule or regulation adopted pursuant to the authority herein granted shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1000.00), or by imprisonment for not longer than six (6) months, or by both such fine and imprisonment."
>
> "Any person who is convicted of a misdemeanor under this Act shall, for a period of five years, be

ineligible for appointment to or employment in a position in State service, and if he or she is an employee of the State, shall forfeit his or her position."

10. That the following rules and regulations of the Personnel Board are and have been in effect at all times material herein:

"1209.2 *REQUIRED RESIGNATION.*

"Any classified employee shall resign his position prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a "political party, partisan political club or organization or serving as a member of a committee of any such group or organization."

1600 *GENERAL PROHIBITIONS AGAINST POLITICAL ACTIVITY AND COERCION AND AGAINST INFLUENCES OTHER THAN MERIT.*

1630 *NO POLITICAL ASSESSMENTS.*

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service."

1640 *NO ORGANIZED POLITICAL ACTIVITY.*

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any

political party or in any political campaign, except to exercise his rights as a citizen privately to express his opinion and to cast his vote.

1641 *DISPLAY OF PARTISAN MATERIAL.*

"An employee in the classified service may not wear a political badge, button, or similar partisan emblem, nor may such employee display a partisan political sticker or sign on an automobile operated by him or under his control. Continued use or display of such political material shall be deemed willful intent to violate the provisions of 74 O.S. 1961 §818 relating to prohibited political activities of classified State employees and shall subject such employee to dismissal pursuant to said statute."

1650 *PENALTY FOR VIOLATION.*

"Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions concerning restricted political activity, discrimination or other prohibited act, the State Personnel Board shall notify the officer or employee so charged and the Appointing Authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision concerning restricted political activity, discrimination or other prohibited act, the Board shall direct the Appointed Authority to dismiss such officer or employee; and the Appointing Authority so directed shall comply."

s/t Terry Shipley
119½ South Third Street
Noble, Oklahoma 73068 872-5111
Oklahoma City, Oklahoma 236-1200

s/t John C. Buckingham
Suite 1213, 100 Park Ave Building
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiffs

s/t Harvey Cody
Attorney for Defendant Corporation
Commission of Oklahoma

s/ Mike D. Martin

t/ Larry Derryberry, Attorney General
of Oklahoma by Mike Martin
Attorney for Defendant Oklahoma
State Personnel Board

Filed January 7, 1972

[Letterhead of Oklahoma State Personnel Board]

December 1, 1971

Terry G. Shipley
119½ South Third Street
Noble, Oklahoma 73068

John C. Buckingham
Suite 1213
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Certified Mail
No. 211026

RE: PAH 3-71-3

Gentlemen:

I have received your letters of November 3 and 12, 1971, concerning the State Personnel Board's charges of prohibited political activity against state classified employee, Clive R. Rigsby.

Based upon your request in the latter communication, and in accordance with Section 309 (4) of Title 75 O.S., Supp. 1970, we submit the following additional information concerning the charges and same represents the basic charges as of this date. Additional information will be forwarded as appropriate.

Generally, Mr. Rigsby knowingly violated the provisions of Title 74 O.S. 1961, Section 818, in that he took part in the management or affairs of a political campaign, and solicited campaign contributions.

Specifically, Mr. Rigsby participated in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones by:

1. Seeking out other Corporation Commission employees to assist in the campaign. Those employees contacted by Mr. Rigsby concerning their assistance in the campaign include Cecil F. Smith of Ada, who was talked to in person at the Oil and Gas Conservation Division District Office in Ada a short time prior to the general election of November 3, 1970.

2. Soliciting money to be used in the campaign, Mr. Rigsby talked to in person Cecil F. Smith of Ada at the Oil and Gas Conservation Division District Office in Ada a short time prior to the primary election of August 25, 1970, and solicited his contribution of money to the campaign.

The objections you stated in your letter of November 3, 1971, are hereby noted, and are considered as motions. The Board will decide whether to hear arguments at the time of the public hearings, or on an earlier date; ample notice will be given.

Sincerely,

OKLAHOMA STATE MERIT SYSTEM

s/ Keith B. Frosco
Keith B. Frosco, Director

KBF:daw

cc: Clive R. Rigsby, R. R. 1, Box 102-A, Ada, Oklahoma 74820

A. E. Plume, Chairman, Oklahoma State Personnel Board, Ardmore, Oklahoma 73401

[Letterhead of Oklahoma State Personnel Board]

December 1, 1971

Terry G. Shipley
119½ South Third Street
Noble, Oklahoma 73068

John C. Buckingham
Suite 1213
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Certified Mail
No. 211026

RE: PAH 2-71-2

Gentlemen:

I have received your letters of November 3 and 12, 1971, concerning the State Personnel Board's charges of prohibited political activity against state classified employee, Jammy R. Ury.

Based upon your request in the latter communication, and in accordance with Section 309 (4) of Title 75 O.S., Supp. 1970, we submit the following additional information concerning the charges and same represents the basic charges as of this date. Additional information will be forwarded as appropriate.

Generally, Mr. Ury knowingly violated the provisions of Title 74 O.S., 1961, Section 818, in that he took part in the management or affairs of a political campaign.

Specifically, Mr. Ury participated in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones by talking in person to Cecil F. Smith, Charles E. Conley, Jr.,

and Don E. Colston at the Davis weigh station in April or May of 1970, and sought their referrals to persons who might assist in the campaign. Also contacted concerning referrals to persons who might assist in the campaign were:

(a) Doris F. McKeever of Duncan, Dorothy S Klinnert of Omega, Charles E. Conley, Jr. of Midwest City, Don E. Colston of Moore, Kenneth D. Donley, Vernon Clark and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Kingfisher during October, 1970.

(b) Cecil B. Smith of Ada, O. T. Perrin, Hubert H. Hibbin, Zachary Sweeney and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Ada during October, 1970.

(c) Jody L. Kirk, James O. Echols, Woodrow W. Lillard, Victor W. Hodge and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Bristow during October, 1970.

(d) Albert E. Deudauer, Jim W. Martin, Carter E. Scott and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Duncan during October, 1970.

The objections you stated in your letter of November 3, 1971, are hereby noted, and are considered as motions. The Board will decide whether to hear arguments at the time of the public hearings, or on an earlier date; ample notice will be given.

Sincerely,

OKLAHOMA STATE MERIT SYSTEM

/s/ Keith B. Frosco
Keith B. Frosco, Director

KBF:daw

cc: Jimmy R. Ury, 4816 Woodview, Oklahoma City, Oklahoma 73115

A. E. Plume, Chairman, Oklahoma State Personnel Board, Ardmore, Oklahoma 73401

[Letterhead of Oklahoma State Personnel Board]

December 1, 1971

Terry G. Shipley
119½ South Third Street
Noble, Oklahoma 73068

John C. Buckingham
Suite 1213
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Certified Mail
No. 211026

RE: PAH 1-71-1

Gentlemen:

I have received your letters of November 3 and 12, 1971, concerning the State Personnel Board's charges of prohibited political activity against state classified employee, William M. Broadrick.

Based upon your request in the latter communication, and in accordance with Section 309 (4) of Title 75 O.S., Supp. 1970, we submit the following additional information concerning the charges and same represent the basic charges as of this date. Additional information will be forwarded as appropriate.

Generally, Mr. Broadrick knowingly violated the provisions of Title 74, O.S. 1961, Section 818, in that he took part in the management or affairs of a political campaign, and solicited and received campaign contributions.
Specifically, Mr. Broadrick participated in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones by:

1. Contacting other Corporation Commission employees seeking advice as to Commission employees who might "kick in" concerning the campaign. Those employees which Mr. Broadrick contacted concerning other Commission employees who might "kick in" include Cecil F. Smith of Ada, who was talked to in person at a roadside cafe between Asher and Ada a short time prior to the primary election of August 25, 1970.

2. Contacting other Corporation Commission employees seeking their referrals to persons who might assist in the campaign. The employees Mr. Broadrick contacted concerning referrals to person who might assist in the campaign include:
(a) Cecil F. Smith of Ada who was talked to in person at a roadside cafe between Asher and Ada a short time prior to the primary election on August 25, 1970.

(b) Cecil F. Smith of Ada who was talked to in person at the Oil and Gas Conservation Division District Office in Ada a short time prior to the primary election on August 25, 1970.

(c) Doris F. McKeever of Duncan, Dorothy S. Klinnert of Omega, Charles E. Conley, Jr. of Midwest City, Don E. Colston of Moore, Kenneth D. Donley, Vernon Clark and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Kingfisher, during October, 1970.

(d) Cecil F. Smith of Ada, O. T. Perrin, Hubert H. Hibbin, Zachary Sweeney and other Commissions employee who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Ada during October, 1970.

(e) Jody L. Kirk, James O. Echols, Woodrow W. Lillard, Victor W. Hodge and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Bristow during October, 1970.

(f) Albert E. Deudauer, Jim W. Martin, Carter E. Scott and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Duncan during October, 1970.

3. Directly soliciting money to be used in the campaign. Mr. Broadrick talked in person to Cecil F. Smith of Ada at the Oil and Gas Conservation Division District Office in Ada a short time prior to the general election of November 3, 1970, and solicited his share of the campaign expenses.

4. Directly receiving solicited money to be used in the campaign. Mr. Broadrick talked in person to Cecil F. Smith of Ada at the Oil and Gas Conservation Division District Office in Ada a short time prior to the general election of November 3, 1970, and received from him approximately $22.00 as his share of solicited campaign contributions.

5. Directly receiving a contribution of money to be used in the campaign. Mr. Broadrick talked in person to Cecil F. Smith of Ada at the Oil and Gas Conservation Division District Office in Ada a

short time prior to the general election of November 3, 1970, and received from him a contribution of approximately $22.00.

6. Receiving and distributing campaign posters, Mr. Broadrick received directly and/or indirectly campaign posters from the printer, Central Process and Sales Co. of Tulsa, and contacted Don E. Colston of Marietta by telephone at his home in July, 1970, concerning the receipt and distribution of the campaign posters. Also contacted concerning the receipt and distribution of campaign posters were:

(a) Doris F. McKeever of Duncan, Dorothy S. Klinnert of Omega, Charles E. Conley, Jr. of Midwest City, Don E. Colston of Moore, Kenneth D. Donley, Vernon Clark and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Kingfisher during October, 1970.

(b) Cecil F. Smith of Ada, O. T. Perrin, Hubert H. Hibbin, Zachary Sweeney and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Ada during October, 1970.

(c) Jody L. Kirk, James O. Echols, Woodrow W. Lillard, Victor W. Hodge and other Commission employees who were talked to individually and/or as a group during a staff meeting at the Oil and Gas Conservation Division District Office in Britow during October, 1970.

(d) Albert E. Deudauer, Jim W. Martin, Carter E. Scott and other Commission employees who were talked to individually and/or as a group dur-

ing a staff meeting at the Oil and Gas Conservation Division District Office in Duncan during October, 1970.

The objections you stated in your letter of November 3, 1971, are hereby noted, and are considered as motions. The Board will decide whether to hear arguments at the time of the public hearings, or on an earlier date; ample notice will be given.

Sincerely,

OKLAHOMA STATE MERIT SYSTEM

s/ Keith B. Frosco
Keith B. Frosco, Director

KBF:daw

cc: William M. Broadrick, 821 Nancy Drive, Ada, Oklahoma, 74820

A. E. Plume, Chairman, Oklahoma State Personnel Board, Ardmore, Oklahoma 73401

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-71-696

WILLIAM M. BROADRICK, ET AL., Plaintiffs,
vs. No. CIV-71-696
THE STATE OF OKLAHOMA, EX REL, THE OKLAHOMA STATE PERSONNEL BOARD, ET AL., Defendants.

ORDER

The above entitled action came on for trial before the Court on January 20, 1972, the plaintiffs appearing in person and by their attorneys, Terry Shipley and John C.

Buckingham; Mike D. Martin, Assistant Attorney General, appearing as counsel for the defendants, The State of Oklahoma, ex rel, The Oklahoma State Personnel Board, and A. E. Plume, Chairman, Raymond H. Fields, Vice-Chairman, Nathan A. Sams, Member, Tom R. Moore, Member, E. W. Harper, Member, Mrs. John D. (Helen) Cole, Member, Oklahoma State Personnel Board; and Keith B. Frosco, Director of the Oklahoma State Personnel Board; and Larry Derryberry, Attorney General of Oklahoma; Jack A. Swidensky and Harvey Cody appearing as counsel for the defendants, the Corporation Commission of the State of Oklahoma, Charles Nesbitt, Chairman, Ray C. Jones, Vice-Chairman, and Wilburn Cartwright, Member. Testimony having been offered and briefs filed by all parties, and the Court having filed its Findings of Fact, Conclusions of Law, and its Memorandum Opinion herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that judgment be for the defendants and plaintiffs' cause of action is hereby dismissed.

Dated this 28th day of February, 1972.

s/ William J. Holloway, Jr.
UNITED STATES CIRCUIT JUDGE

s/ Fred Daugherty
UNITED STATES DISTRICT JUDGE

s/ Luther B. Eubanks
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED IN CIVIL DOCKET ON FEB 28, 1972

ADELAIDE HOLSTON, DEPUTY.

APPROVED AS TO FORM:

s/t Terry Shipley
Attorneys for Plaintiffs

s/t Mike D. Martin
Assistant Attorney General
Attorney for Defendants, The Oklahoma State Personnel Board, A. E. Plume, Chairman, Raymond H. Fields, Vice-Chairman, Nathan A. Sams, Member, Tom R. Moore, Member, E. W. Harper, Member, Mrs. John D. (Helen) Cole, Member; Keith B. Frosco, Director of the Oklahoma State Personnel Board; and Larry Derryberry, Attorney General of Oklahoma

Filed February 28, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title Omitted in Printing]

MOTION FOR NEW TRIAL

Come now the plaintiffs, William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, for themselves and for the Class "Classified Employees within the Classified Service of the State of Oklahoma," and pursuant to Rule 59 of the Federal Rules of Civil Procedure respectfully move that the judgment entered herein on the 28th day of February, 1972, be vacated and set aside, and that a new trial be granted on the grounds that the said judgment is against the evidence, and for the further reason that said judgment is against and contrary to the law.

Attached hereto is plaintiffs' Brief in support hereof.

s/t TERRY SHIPLEY
119½ South Third Street
Noble, Oklahoma 73068 872-5111
Oklahoma City, Oklahoma 236-1200

t/ John C. Buckingham
Suite 1213, 100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Attorneys for Plaintiff

Filed March 9, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma

Date: March 31, 1972

BROADRICK, et al)
Plaintiff,)
vs.) Case No. 71-696 Civil
)
STATE OF OKLAHOMA, et al)
Defendant.)

ENTER ORDER:

By order of Judges Holloway, Daugherty and Eubanks the motion of plaintiffs for a new trial filed herein on March 9, 1972 is overruled.

Counsel Notified [ ]

Clerk to Notify [XXX]

s/ Luther B. Eubanks
United States District Judge

Filed April 3, 1972

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[TITLE OMITTED IN PRINTING]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the Final Order entered by the Three Judge Court in this action on March 31, 1972, denying Plaintiffs' Motion for a New Trial on the Order entered in this action on February 28, 1972, denying the declaratory and injunctive relief prayed for in the Complaint pursuant to 42 U.S.C., §1983.

This appeal is taken pursuant to 28 U.S.C. §§1253 and 2284, and 42 U.S.C. §1984.

s/t John C. Buckingham
100 Park Avenue Building
Suite 1213
Oklahoma City, Oklahoma 73102

Filed April 21, 1972

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ———

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and its Members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and its Members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

JURISDICTIONAL STATEMENT

TERRY SHIPLEY
119½ South Third Street
Noble, Oklahoma 73068

JOHN C. BUCKINGHAM
Suite 1213
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Counsel for Appellants

June, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES:

AUTHORITIES CONTINUED PAGE

STATUTES:

In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. ———

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and NATHAN A. SAMS, Chairman, A. E. PLUME, Vice-Chairman, TOM R. MOORE, Member, RAYMOND H. FIELDS, Member, E. W. HARPER, Member, JOSEPH TURNER, Member, and MRS. JOHN D. (HELEN) COLE, Member, in their individual capacities and as members of the defendant Oklahoma State Personnel Board; and KEITH B. FROSCO, Director of the Oklahoma State Personnel Board; and the CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CHARLES NESBITT, Chairman, RAY C. JONES, Vice-Chairman, and WILBURN CARTWRIGHT, Member, in their individual capacities and as members of the defendant Corporation Commission; and LARRY DERRYBERRY, Attorney General of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

JURISDICTIONAL STATEMENT

THE OPINION BELOW

The Three-Judge Court convened to hear and decide this cause in the United States District Court for the Western District of Oklahoma and delivered its written Memo-

randum Opinion on February 14, 1972. The opinion is officially reported as *William M. Broadrick, et al.* v. *The State of Oklahoma, ex rel. the Oklahoma State Personnel Board, et al.*, 338 F.Supp. 711 (1972). The opinion is reproduced in the Appendix to this Jurisdictional Statement, beginning on page i.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. This is a civil class action for declaratory and injunctive relief to enjoin the deprivation of the civil rights of Appellants and all classified employees of the State of Oklahoma, and is authorized by 42 U.S.C. §1983. The Appellee, Oklahoma State Personnel Board, initiated proceedings against each Appellant under color of 74 O.S. 1971 §818 to dismiss each Appellant from his employment with the Corporation Commission of the State of Oklahoma for alleged political activities. Appellants are accused variously of soliciting campaign contributions, seeking out others to engage in political activities and transporting campaign posters. Appellants contend that the blanket prohibitions against political activities in the statute unjustifiably encroach upon the Appellants' First Amendment rights of free speech, assembly and press, and denies equal protection of the laws in that it denies that group of citizens the rights granted to all other State employees and all other citizens, and there is no justification for the distinction. Appellants also contend that the statute divests those classified employees of the Fifth and Fourteenth Amendment guarantees of due process of law in that Appellants are denied political liberty without justification. The decision

of the Three-Judge Court of the United States District Court for the Western District of Oklahoma sustained the validity of 74 O.S. 1971 §818.

2. The judgment or decree sought to be reviewed is the ruling of the Three-Judge Court denying Appellants' application for declaratory and injunctive relief and dismissing Appellants' cause of action. The Motion for New Trial was filed on March 9, 1972, and was overruled on March 31, 1972. The Appellants' Notice of Appeal was filed in the United States District Court for the Western District of Oklahoma on April 21, 1972.

3. Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253 inasmuch as this proceeding challenges the constitutionality of a State statute, and 28 U.S.C. §2281 requires a District Court of three judges to determine the issue.

4. Cases sustaining the jurisdiction of this Court are:

—*Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116;

King v. *Smith*, 392 U.S. 309, 20 L.Ed.2d 1118, 88 S.Ct. 2128;

Damico v. *California*, 389 U.S. 416, 19 L.Ed.2d 647, 88 S.Ct. 526 (1967).

Keyishan v. *Board of Regents of New York*, 87 S.Ct. 675 (1967);

Kinnear v. *City and County of San Francisco*, 38 Cal.Rptr. 631, 392 P.2d 391;

Pickering v. *Board of Education*, 88 S.Ct. 1731;

United Public Workers of America v. *Mitchell*, 67 S.Ct. 556 (1947);

5. The constitutional validity of the 6th and 7th unnumbered paragraphs of 74 O.S. 1971 §818 (Oklahoma Statutes) is here involved. The challenged paragraphs provide:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office or shall take part in the management or affairs of any political party or in any policitical campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

The entire statute is lengthy and is set out verbatim in the Appendix. The Oklahoma State Personnel Board is proceeding according to the 8th unnumbered paragraph of the statute which provides as follows:

> "Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Di-

rector to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply."

74 O.S. 1971 §819 declares violations to be a misdemeanor. However, criminal prosecutions are not pending nor contemplated at this time.

QUESTIONS PRESENTED BY THE APPEAL

I. May a State constitutionally broadly prohibit State employees from:

(1) Freely and publicly expressing opinions regarding any political party or any political campaign?

(2) Taking part in any political campaign?

(3) Taking part in the management or affairs of any political party?

(4) Being a candidate for nomination or election to any paid political office?

(5) Being an officer or member of a committee of a partisan political club?

(6) Being a member of any national, state or local committee of a political party?

(7) Being concerned in any manner in soliciting or receiving any assessment, subscription or contri-

bution for any political organization, candidacy or other political purpose?

II. May a State constitutionally classify the employees of some, but not all, of its State agencies and broadly prohibit the employees of those agencies from engaging in the activities described above while permitting the unclassified employees of the State, all other public employees and the citizenry at large to freely engage in those activities?

STATEMENT OF THE FACTS OF THE CASE

Appellants, William M. Broadrick, Jimmy R. Ury and Clive R. Rigsby, are employees of the Corporation Commission of the State of Oklahoma, an agency and instrumentality of the State. They are residents of the State of Oklahoma and of the United States.

The 1959 Oklahoma Legislature enacted the Oklahoma Merit System of Personnel Administration Act, 74 O.S.A. §§801 *et seq.*, which placed the employees of certain named State agencies within the classified service for the stated purpose of rendering their employment subject to merit rather than political allegiance. The Act prohibits the designated agencies from dismissing or suspending classified employees for political reasons, but it authorizes the State Personnel Board to effect dismissal or suspension of a classified employee who is politically active, and even prohibits the expression of political sentiments other than private expressions.

On October 18, 1971, the Personnel Board formally accused each Appellant of prohibited political conduct dur-

ing the 1970 re-election campaign of Corporation Commissioner Ray C. Jones. The Appellants then sought injunctive and declaratory relief in the United States District Court for the Western District of Oklahoma challenging the consitutional validity of that part of the Oklahoma Merit Act which prohibits political expressions and activities on the part of classified employees as violating their First Amendment rights of free speech, assembly and press; and their Fifth and Fourteenth Amendment rights to equal protection and due process of law.

A Three-Judge Court was convened to hear and determine the case. The Court dismissed the cause of action. In so doing, the Court narrowly construed the Act to prohibit only partisan *party* political activities and found that the statute does not restrict public expressions on public affairs and personalities so long as the employee does not channel his activity towards party success.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The many cases cited by the parties to support their respective arguments demonstrate that numerous legislative bodies throughout the United States have enacted State statutes, county, city, district and local ordinances proscribing the political liberties of public employees.

The statutes and ordinances encroach in varying degrees upon the First Amendment rights of free speech, assembly and press of those public employees and effectively inhibit the political liberties of the families of those public employees. If a public employee may not operate a

vehicle displaying a sentiment with political overtones or display a political sentiment in his front yard, the family car and the family home, and thus the entire family, are affected.

In *Dombroski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116, this Court pointed out that:

> "The chilling effect upon exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure . . . .
>
> "So long as the statute remains available to the state, the threat of prosecution of protected expression is a real and substantial one. Even the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect upon protected expression."

Although the highest courts of some states have had the opportunity to strike down the portions of those enactments which encroach too far upon the Federally-protected right of free speech, the paralyzing chill of similar enactments in other jurisdictions will continue until some hardy soul in each of those jurisdictions is willing to risk his fortunes and livelihood to vindicate those Federally-protected rights.

On February 10, 1947, this Court decided *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), sustaining the validity of the Federal Hatch Act, 5 U.S.C. §7321 *et seq.*, against contentions that the Act unconstitutionally divested Federal employees of their Federally-protected constitutional rights of free speech, equal protection and due process.

The Hatch Act generally prohibits Federal employees from engaging in certain political activities which the Congress deemed contrary to the public interest. The Act applies equally to all Federal employees except those in high-level administrative positions, policy-making positions and other reasonably excepted positions. The Act expressly permits Federal employees to freely and publicly express their opinions about political candidates and issues. The Act defines the political campaigns in which a Federal employee may and may not participate, and the classification relates reasonably to the extent to which participation in such campaigns may affect the integrity of the service.

Since *Mitchell*, numerous state and local legislative bodies have enacted civil service type statutes and ordinances which go far beyond the Hatch Act in restricting the political liberties, freedom of speech, freedom of press, freedom of assembly, equal protection and due process rights of public employees guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The proliferation of those enactments is exemplified by the multitude of litigated cases in the State and Federal Courts. The results in those cases have not been uniform, and invariably turn on questions of Federal constitutionality in the State as well as the Federal forums. In general, the Courts wrestle with the ultimate question: Whether a compelling state or local interest justifies the obvious deprivation of Federally-protected First, Fifth and Fourteenth Amendment rights of those affected by the enactments? The Oklahoma Merit System of Personnel Administration Act, 74 O.S. 1971, §801 *et seq.*, stifles and circumscribes those rights to a far greater extent than the

Hatch Act, and the Oklahoma Act is not unique. The various State and local counterparts throughout the nation affect millions of American citizens and paralyze the exercise of fundamental freedoms to a far greater extent than is necessary to accomplish the legitimate purposes of those enactments. This result is universally accomplished by framing those enactments in terms broad enough and vague enough, unlike the Hatch Act, to assure that the public employees covered by those enactments exhibit no political coloration of any kind, character or degree.

The Oklahoma Act prohibits classified employees from taking part in the management or affairs of *any* political campaign; it does not exempt initiative and referendum campaigns as does the Hatch Act; it permits only *private* expressions of political opinions; and it broadly prohibits a classified employee from becoming a candidate for nomination or election to any paid public office.

It is not reasonable to decree that the public or semi-public expression of a typist employed by the Oklahoma Corporation Commission regarding her opinion about a presidential candidate, or school board candidate, mayor candidate, sheriff or candidate to the State Legislature, conceivably destroys the integrity of the State Government. This purported threat to a compelling State interest is rendered less defensible by the simultaneous decree that a typist performing essentially the same functions in the office of the Secretary of State may freely engage in political activities without restriction. The employees of one arbitrarily selected State agency are subject to the Merit Act, and the employees of the other arbitrarily excluded

agency are not subject to the Act; 74 O.S. 1971, §§803, 803.1, 803.2 and 803.3, beginning on page xii of the Appendix.

It is argued that *Mitchell* legitimizes these disenfranchisements of a large and ever-growing segment of the national community despite the relatively innocuous proscriptions of the Hatch Act. This illusion cries out to be dispelled by this Court. The illusion persists despite explicit expressions from this Court. In *Pickering* v. *Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731, a School Board fired a teacher for publicizing his opinions concerning the School Board and the operations of the school, and this Court pointed out that:

> "* * * Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

Public employees, as a class, are the members of the community most apt to be informed regarding the efficiency, integrity and other qualities of those who administer the public agency employing them. The electorate could and should have the benefit of those opinions. The free availability of informed opinions serves the public interest, and the suppression of informed opinions serves only villainy. The credibility of those opinions is subject to the same evaluating criteria as are applied to all opinions. They should not be stifled.

In *Keyishan* v. *Board of Regents of New York*, 385 U.S. 589, 17 L.Ed. 629, 87 S.Ct. 675, this Court determined that the State of New York could not in vague and broad terms

prohibit faculty members of the State University from uttering sedition or distributing material advocating the forceful overthrow of government or making Communist Party membership *prima facie* evidence of disqualification; and in *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116, determined that the Louisiana Subversive Activities and Communist Control Law was unconstitutionally vague and overbroad, stating that an overly broad statute created a "danger zone" within which protected expression may be inhibited.

Some State and Federal Courts have applied the foregoing cases and have struck down vague and overbroad political activities restrictions in civil service-type enactments. Others have not. The court below in this cause did not.

In *Fort* v. *Civil Service Commission, County of Alameda*, 38 Cal.Rptr. 625, 392 P.2d 385, the California Supreme Court struck down Section 41 of the Charter of Alameda County as unconstitutional under the First Amendment of the Federal Constitution in a proceeding wherein a civil servant of the County became Chairman of a Speakers Bureau for a Committee to re-elect Governor Brown. The language of that Section is almost identical to the political activities prohibitions challenged in this proceeding. In *William J. Kinnear* v. *City and County of San Francisco*, 38 Cal.Rptr. 631, 392 P.2d 391, the California Supreme Court reinstated a deputy sheriff who had been dismissed for filing for election to a public office. Section 5 of the San Francisco Charter provided that the civil service position was automatically forfeited under the circumstances. Overbreadth was the defect of that ordinance. It

forfeited the position of any city officer or employee who became a candidate for election to any public office. In that connection, the Oklahoma Act prohibits a classified employee from becoming a candidate to any paid political office.

The Oregon Supreme Court struck down a similar Oregon statute in *Minielly* v. *State*, 411 P.2d 69, again, principally on the basis of the First Amendment to the Federal Constitution.

The United States Fifth Circuit Court of Appeals struck down a city ordinance of the City of Macon, Georgia, in *Hobbs* v. *Thompson*, 448 F.2d 456. The ordinance prohibited the employees of the City's Fire Department from taking an active part in any primary or election and prohibited them from contributing money to any candidate, soliciting votes or prominently identifying themselves in a political race with or against any political candidate for office. The opinion is a scholarly analysis of the leading decisions relating to political activities restrictions as opposed to federally-protected First, Fifth and Fourteenth Amendment rights. The opinion does not undertake to distinguish the Hatch Act or *Mitchell*, but concludes that *Mitchell* does not square with later civil rights decisions by this Court.

ABUSE OF DISCRETION BY THE COURT BELOW

Appellants respectfully represent and show that they prepared and filed three separate briefs with the court below and thereafter presented oral argument to the Court supporting their position. Many cases were cited in the briefs and argument including *Keyishan, Dombrowski* and *Pickering,* all *supra,* from this Court, and *Fort, Kinnear* and *Minielly,* all *supra,* from the Supreme Courts of California and Oregon. The recent *Hobbs* decision, *supra,* from the United States Fifth Circuit Court of Appeals was emphasized in the briefs and argument. Those cases are addressed to the precise issues in this action and are, in our judgment, dispositive.

The Memorandum Decision of the Three-Judge Court neither distinguishes those cases from this case nor rebuts the principles of law expressed in those cases, but wholly ignores those cases. None of those cases are mentioned in the Memorandum Decision.

The decision is based principally on *Mitchell* (1947), *supra,* and *Gray* v. *City of Toledo,* D.C., 323 F.Supp. 1281.

In *Mitchell,* this Court considered the Hatch Act and observed, 330 U.S. at 99-100, 67 S.Ct. 556:

> "It * * * forbids only the *partisan* activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests * * *
>
> "* * * It is only *partisan* political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, *public*

> *or private*, on public affairs, personalities and matters of public interest, not an objective of *party* action, are unrestricted by law so long as the Government employee does not direct his activities toward *party* success." (Emphasis supplied.)

Mitchell simply does not redeem the Oklahoma statute which broadly prohibits a classified employee from taking part in the management or affairs of *any* political campaign "except to exercise his right as a citizen *privately* to express his opinion and to cast his vote." (Emphasis supplied.)

The *Gray* decision, *supra*, cited by the Three-Judge Court, wholly supports Appellants' cause of action. That Court expressly held that a Toledo City Charter and Rule provision which prohibited specified employees from soliciting or receiving contributions for any "political purpose" was ambiguous, overreaching and unconstitutional.

The Oklahoma statute provides:

> "No employee in the classified service * * * shall, directly or indirectly, solicit or receive, or in any manner be concerned in soliciting or receiving any * * * contribution for any political organization, candidacy or other political purpose * * *."

The *Gray* decision further held that the phrases, "candidate for public office," "political movements," "political campaigns," "organization" and "political club" are imprecise and overreaching. The Oklahoma statute is replete with identical and similar phrases.

The *Gray* decision also considered Section 143.41 of the Ohio Revised Code and pointed out that the statute by

itself left the impression that the statute was overreaching and encompassed protected political activities, but acquiesced in the Ohio Supreme Court's narrow construction of the statute stating:

> "In declaring a litigant's rights under a state statute this Court must read the statute in light of the interpretation given it by the state courts."

The Three-Judge Court in this action utilized the explanation of that narrow construction to narrowly construe the Oklahoma statute. In that connection, the Ohio statute expressly permitted the public employees of that state to "express freely" their "political opinions."

The *Gray* decision did hold that the political activities restrictions of the Toledo City Charter and Rules constituted an "unconstitutional gagging of a policeman's right to free speech and expression."

CONCLUSION

There has been a proliferation of civil service type State and local enactments throughout the nation since this Court decided *Mitchell*. Those enactments are typically vague and overbroad. This Court has repeatedly stated that statutes which encroach upon the fragile First, Fifth and Fourteenth Amendment rights of a class of citizens must be narrowly drawn so as to encroach upon those rights only to the extent absolutely necessary to accomplish a legitimate State purpose, and that the purpose must be a compelling purpose. The Oklahoma Merit System of Personnel Administration Act does not meet that test.

Petitioners respectfully submit that the Federal question presented in this appeal is substantial indeed. That too many voices which should be heard are stilled and paralyzed by an array of State and local enactments ostensibly designed to free public employees from political rewards and reprisals but which, in fact, punish those employees for the exercise of their First Amendment rights of free speech, assembly and press unnecessarily and without the compelling justification required for the limitation of those rights.

The cases, both State and Federal, are in serious conflict. *Mitchell* was the last expression of this Court respecting the balance between First, Fifth and Fourteenth Amendment rights and a compelling governmental interest in preserving the integrity of its public servants. The widespread adoption of State and local civil service-type enactments has occurred since that 1946 opinion. *Hobbs* raises the serious question as to whether or not *Mitchell* now squares with intervening civil rights expressions from this Court. Appellants respectfully urge this Court to review the decision of the Three-Judge Court appealed from herein.

Respectfully submitted,

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Noble, Oklahoma 73068

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Counsel for Appellants

June, 1972

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

The Honorable Larry Derryberry,
State Attorney General,
State Capitol Building
Oklahoma City, Oklahoma 73105

Keith B. Frosco, Director
State Personnel Board
407 Sequoyah Memorial Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel
and
Harvey Cody, Conservation Attorney
Oklahoma Corporation Commission
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

all parties required to be served, by mailing such true and correct copies, postage prepaid, this _____day of June, 1972.

_____

TERRY SHIPLEY

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Stamped]
FILED
Feb 14 1972
REX B. HAWKS
Clerk, U. S. District Court
By (illegible)
Deputy

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma"

Plaintiffs

vs.

CIVIL NO. 71-696

THE STATE OF OKLAHOMA, ex rel., THE OKLAHOMA STATE PERSONNEL BOARD, and NATHAN A. SAMS, Chairman, A. E. PLUME, Vice-Chairman, TOM R. MOORE, RAYMOND H. FIELDS, E. W. HARPER, JOSEPH TURNER, and MRS. JOHN D. (HELEN) COLE, Members, in their individual capacities and as members of the defendant, OKLAHOMA STATE PERSONNEL BOARD; and KEITH B. FROSCO, Director of the Oklahoma State Personnel Board; and the CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CHARLES NESBITT, Chairman, RAY C. JONES, Vice-Chairman, and WILBURN CARTWRIGHT, Member, in their individual

[APPENDIX]

capacities and as members of the defendant Corporation Commission; and LARRY DERRYBERRY, ATTORNEY GENERAL

Defendants

Terry Shipley, Noble, Oklahoma, and John C. Buckingham, Oklahoma City, Oklahoma, for Plaintiffs

Jack Swidensky and Harvey Cody, General Counsel and Conservation Atty. respectively for Defendant, Corporation Commission and Commissioners; Honorable Larry Derryberry, Attorney General of the State of Oklahoma, Mike D. Martin, Paul C. Duncan, Jr., and Odie A. Nance, Assistants to the Attorney General, for Defendants State of Oklahoma, ex rel., The Oklahoma State Personnel Board, Members and Director thereof; and Defendant Larry Derryberry, Attorney General

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William J. Holloway, Jr., United States Circuit Judge
Fred Daugherty, United States District Judge
Luther B. Eubanks, United States District Judge

MEMORANDUM OPINION

EUBANKS, United States District Judge

BACKGROUND AND OUTLINE OF THE ISSUES

This is a declaratory class action brought by three employees of the Oklahoma Corporation Commission seeking an Order of this Court declaring a portion of the Oklahoma Merit System of Personnel Administration Act to be unconstitutional. Jurisdiction is conceded under 42 U.S.C. § 1983 and a three-judge court was convened to hear the matter pursuant to 28 U.S.C. §2281 et seq.

The issues as framed at the pretrial conference are:

Plaintiffs contend that the defendants, and each of them, under color of 74 O.S., Section 818, in pertinent part as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> No employee in the classified service shall be a member of any national, state or local committee of a politiical party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States. In more particularity, plaintiffs contend:

1. That the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs' First Amendment rights of free speech, assembly and press;

2. That the above quoted paragraphs of Section 818 are extremely broad in that they abridge plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;

3. That the above quoted paragraphs of Section 818 are unconstitutionally vague, and reasonable men often differ as to their interpretation and may only guess at what activities fall within the broad prohibition in the Statute;

4. That the above quoted paragraphs of Section 818 deny the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction.

5. That the above quoted paragraphs of Section 818 divest the plaintiffs' Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;

6. That Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that their vested property rights are subject to divestment without just cause or due process;

7. That plaintiffs, William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, by virtue of their employment with the State of Oklahoma, have acquired valuable vested property rights. The Merit System of Personnel Administration Act of Oklahoma, supra, vests said plaintiffs with rights of tenure during good behavior and the Oklahoma Retirement System Act vests said plaintiffs with valuable retirement benefits upon the condition that said plaintiffs be employed in good standing upon the date of their retirement;

8. That the defendants threaten to invoke the sanctions of Section 818 against said plaintiffs for certain alleged political activities of the plaintiffs, and the defendant, Oklahoma State Personnel Board, and its members threaten to order the defendant, Corporation Commission, and its members to dismiss plaintiffs from their employment pursuant to Section 818 which requires the defendant, Corporation Commisson, to comply;

9. That plaintiffs have no adequate remedy at law and the defendants will, if not enjoined by this Court, undertake to effect the dismissal of plaintiffs from their employment, all under color of Section 818.

The defendant, Corporation Commission, contends that:

1. They consider the plaintiffs good employees and have not threatened to dismiss them, or any of them, and have no intention to dismiss them unless required to do so by a lawful order of an authority authorized by law to compel said defendants to dismiss plaintiffs from their employment;

2. The defendant, Oklahoma State Personnel Board, as of the time of the filing of the answer of the above named defendants herein, had not furnished the said defendants with any details or information concerning the violations of the Merit System Act other than the copy of the original notice of the general charges made by the Board, and that said defendants were not informed as to the specific violations which the Board may expect to prove and that said defendants deny that they solicited or encouraged the plaintiffs to take part in any political activities at any time.

The State of Oklahoma, ex rel., The Oklahoma State Personnel Board contends as follows:

1. That they specifically deny that they, or any of them, under color of 74 O.S. 1961, Section 818, are subjecting plaintiffs to the deprivation of the rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States;

2. That they specifically deny that the blanket prohibition of political activity in Section 818 is an unjustified encroachment upon the plaintiffs' First Amendment rights of free speech, assembly and press;

3. That they specifically deny that Section 818 is overly broad in that it abridges plaintiffs' First Amendment rights to a far greater extent than is required to correct the evils at which the Statute is directed;

4. That they specifically deny that Section 818 is unconstitutionally vague, and reasonable men often differ as to its interpretation and may only guess at what activities fall within the broad prohibtions in the Statute;

5. That they specifically deny that Section 818 denies the equal protection of the laws to the class of citizens affected by the Statute in that it denies to that group of citizens the rights granted to all other citizens without justification for the distinction.

6. That they specifically deny that Section 818 divests the plaintiffs' Fifth and Fourteenth Amendment guarantees of due process of law in that plaintiffs are denied their political liberty without justification;

7. That they specifically deny that Section 818 divests the class of Fifth and Fourteenth Amendment guarantees of substantive due process of law in that plaintiffs' vested property rights are subject to divestment without just cause or due process;

8. That as to plaintiffs' Contention No. 7, these defendants have no knowledge as to said allegations, and therefore are unable to admit or deny same;

9. That they specifically deny that plaintiffs have no adequate remedy at law.

10. That all of the acts and actions of each of the defendants above named have been in accordance with the laws of the State of Oklahoma;

11. Said defendants specifically deny that any of the Statutes cited in plaintiffs' Complaint are unconstitutional.

Evidence was heard and arguments were presented on January 20, 1972. The Court, being fully advised, does now find and conclude:

FINDINGS OF FACT

1. Plaintiffs are William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, citizens of the State of Oklahoma, for themselves and for the class, "Classified Employees within the Classified Service of the State of Oklahoma." Each plaintiff is, and has been at all times material, an employee of the defendant Corporation Commission of the State of Oklahoma.

2. Each plaintiff is a classified employee of the State within the purview of the Merit System of Personnel Administration Act of Oklahoma, 74 O.S. 1971, §§801, et seq., which is administered by the defendant Oklahoma State Personnel Board.

3. Defendants in the action are the State of Oklahoma, ex rel, the Oklahoma State Personnel Board, and A. E. Plume, Chairman, Raymond H. Fields, Vice-Chairman, Nathan A. Sams, Member, Tom R. Moore, Member, E. W. Harper, Member, Mrs. John D. (Helen) Cole, Member, in their individual capacities and as members of the defendant, Oklahoma State Personnel Board; Keith B. Frosco, Director of the Oklahoma State Personnel Board; Larry Derryberry, Attorney General of Oklahoma; the Corporation Commission of the State of Oklahoma, Charles Nesbitt, Chairman, Ray C. Jones, Vice-Chairman, and Wilbur Cartwright, Member, in their individual capacities and as members of the defendant Corporation Commission.

4. Pursuant to paragraphs six and seven of 74 O.S. 1971, §818 containing prohibitions against political activity on the part of certain state employees, and under authority of paragraph eight of Section 818 and 74 O.S. 1971, §805, the State Personnel Board of the State of Oklahoma on October 15, 1971, charged plaintiffs individually with violating the provisons of paragraphs six and seven of Section 818.

5. On October 18, 1971, notices were sent by the Personnel Board to each of the plaintiffs specifying the charges made against them; after receiving a request for a hearing from plaintiffs, the Personnel Board sent amended notices to plaintiffs on November 16, 1971, reiterating the charges against them and specifying the Oklahoma Statutes under which the hearing would be conducted.

6. Pursuant to a request by plaintiffs for a more detailed description of the charges, the Personnel Board furnished specific data in the nature of a bill of particulars by separate letter to each plaintiff on December 1, 1971.

7. Upon application of plaintiffs to the Personnel Board for a stay of the hearings on the prohibited political activity charges against plaintiffs, the Personnel Board entered an order on December 16, 1971, continuing said hearings until the constitutionality of unnumbered paragraphs six and seven of Section 818 had been determined.

8. This suit filed by plaintiffs on December 16, 1971, attacks only unnumbered paragraphs six and seven of Section 818 relating to prohibited political activity on the part of certain State employees. These paragraphs go to the very heart of the Act.

9. Plaintiffs have failed to establish that reasonable men differ as to the interpretation of the provisions of paragraphs six and seven of Section 818. The same is not vague or overbroad despite minor differences in interpretation by the Attorney General.

10. Paragraphs six and seven of Section 818 are understood by reasonable men to prohibit state employees from being involved in prescribed partisan political activity.

11. Paragraphs six and seven of Section 818 are understood by reasonable men to not prohibit state employees from being involved in non-partisan political activity.

12. Plaintiffs have failed to establish that paragraphs six and seven of Section 818 have cast any chilling effect upon any state employee's First Amendment rights.

13. The issue of whether plaintiffs have or have not violated the Act is not for us to decide.

From the foregoing facts, the Court concluded:

CONCLUSIONS OF LAW

1. The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

2. The Fifth Amendment to the Constitution of the United States provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law."

3. The Fourteenth Amendment to the Constitution of the United States provides that "No state shall make or enforce any law which will . . . deny to any person within its jurisdiction the equal protection of the laws."

4. Paragraphs six and seven of Title 74 O.S. 1971, § 818, do not violate the First, Fifth or Fourteenth Amendment to the Constitution of the United States.

5. Paragraphs six and seven of Title 74 O.S. 1971, § 818, do not violate U. S. Code, Title 42, §1983.

6. We conclude that the Oklahoma Legislature has the power to regulate, within reasonable limits, the political conduct of state employees in order to promote efficiency and integrity in the public service. *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Gray v. City of Toledo*, 323 F. Supp. 1281 (1971). *Stack* v. *Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970), *Wisconsin State Employees Assoc.* v. *Wisconsin Natural Resources Bd.*, 298 F. Supp. 339 (W.D. Wis. 1969).

7. We conclude that the constitutional guarantees of free speech and association are not absolutes and this Court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evils of political partisanship by state employees. *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), *Gray* v. *City of Toledo*, 323 F. Supp. 1281 (1971).

8. We find that a government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly desirable. This interest is of such an importance that it may properly be classified as a compelling governmental interest, and a showing of a compelling governmental interest is sufficient to justify some encroachment upon an individual's first amendment rights. *Gray* v. *City of Toledo*, 323 F. Supp. 1281 (1971). *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 835 S.Ct. 889, 9 L.Ed. 2d 929 (1963). *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed. 2d 405 (1963).

9. We find that the provisions of unnumbered paragraphs six and seven of Title 74 O.S. 1971, §818, prohibiting political activity by state employees, are directly related to the State's goal of prohibiting partisan political activity. Said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten efficiency and integrity and does not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success. These prohibitions do not unduly infringe upon protected rights under the First Amendment to the United States Constitution. *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

10. Plaintiffs claim that they have vested property rights by virtue of their employment with the State of

Oklahoma, tenure through the Merit System of Personnel Administration of Oklahoma and retirement benefits through the Oklahoma Retirement Systems Act. This may be true but by "due process" those rights might be extinguished if violations of the Act are established. The private interests of plaintiffs in their employment are not unconstitutionally affected by paragraphs six and seven of Title 74 O.S. 1971, §818. *Norman* v. *U. S.*, 392 F. 2d 255, 183 Ct. Cl. 41 (1968). *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

11. The claim of plaintiffs that the holding in *Mitchell* has been eroded by the subsequent decisions cited by them is untenable. An inferior court can never "erode" a decision of the United States Supreme Court.

For the foregoing reasons the relief sought by plaintiffs is in all things denied.

Counsel for defendant State of Oklahoma, ex rel., The Oklahoma State Personnel Board will prepare appropriate order in accordance with the foregoing.

The Clerk of the Court is hereby directed to mail a copy hereof to counsel of record.

Dated this 14th day of February, 1972.

s/ William J. Holloway, Jr.

United States Circuit Judge

s/ Fred Daugherty

United States District Judge

s/ Luther B. Eubanks

United States District Judge

STATE OFFICERS AND EMPLOYEES, 74 O.S. 1971

§ 802. Placing of agencies and departments under system—Transfer of books, records, etc.—The word agency as used in this Act is defined to mean any board, commission or institution of the State Government. The Governor of the State of Oklahoma, upon determining that the merit system of personnel administration with the rules and regulations adopted thereunder should be required, is hereby empowered and authorized, at his discretion, by an Executive Order, to place any agency or department of the State Government, and the employees thereof, with exempt positions as stipulated by said order, under the merit system of personnel administration prescribed by this Act and the rules and regulations promulgated hereunder by the State Personnel Board. This Section shall not authorize by Executive Order the removal of any agency or department of State government placed under the merit system of personnel administration prescribed by this Act and the rules and regulations promulgated hereunder by the State Personnel Board.

Notwithstanding any provisions to the contrary, this Act shall not be extended to any department or agency or employee, except in the manner as provided in this Section. Pending the issuance of any such Executive Order by the Governor and pending the effective date of the system as specified in any of said orders by the Governor, the agency or departmental merit system for personnel administration heretofore established in any of the State departments shall be in full force and effect.

Any Executive Order of the Governor may provide that the agencies or departments affected thereby shall transfer to the State Personnel Board hereafter created, all books, records, registers, equipment, and other property heretofore made available for the operation of its agency or departmental merit system.

§ 803. Unclassified service.—Offices and positions in the unclassified service are in no way subject to any of the provisions of this Act or of the rules and regulations promulgated hereunder by the State Personnel Board.

The unclassified service of the State shall include the following:

(1) persons chosen by election or appointment to fill an elective office, and their employees, except all of the employees of the Corporation Commission, who shall be under the provisions of the classified service of the State; and except the employees of the Department of Education including the Deputy State Superintendent of Public Instruction; and, provided further, that immediately upon the enactment hereof the employees of said Department of Education and said Deputy State Superintendent of Public Instruction shall become classified employees;

(2) members of boards and commissions, and heads of departments, agencies and institutions required by law to be appointed by the Governor;

(3) one principal assistant or deputy and one private secretary for each head of a department, agency or institution who is required by law to be appointed by the Governor;

(4) all employees in the office of the Governor and all persons required by law to be appointed by the Governor;

(5) judges, referees, receivers, jurors, Assistant Attorney General and notary public, as such;

(6) officers and employees of the Oklahoma Legislature;

(7) all officers and employees of the Oklahoma State System of Higher Education, State Board of Education, Division of Vocational Education, and all employees of all public school districts;

(8) patient and inmate help in the state charitable, penal, mental and correctional institutions;

(9) persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation, or examination on behalf of the legislature or a committee thereof, or by authority of the Governor;

(10) officers and members of the Oklahoma National Guard, as such;

(11) persons engaged in public work for the State, but employed by contractors when the performance of such contract is authorized by the legislature or other competent authority;

(12) election officials and employees;

(13) temporary seasonal farm laborers, or other farm help engaged in a single phase of agricultural production or harvesting, not to exceed one hundred twenty (120) calendar days in any year;

(14) professional trainees only during the prescribed length of their course of training or extension study;

(15) laborers, semiskilled and skilled craftsmen temporarily engaged for purposes of building, renovation, or remodeling and paid on an hourly, or piecework basis, provided the request is made by the appointing authority and is approved by the State Personnel Board;

(16) seasonal employees employed during the period May 1 through October 15 in any calendar year;

(17) students who are employed on a part-time basis and who are regularly enrolled in (a) an institution of higher learning within the Oklahoma State System of Higher Education or (b) an institution of higher learning qualified to become coordinated with said State System of Higher Education.

§ 803.1. Unclassified service—Additional offices and positions.—The unclassified service of this State shall include the following offices and positions in addition to the offices and positions listed in Section 803, Title 74, Oklahoma Statutes 1961:

(1) The Executive Secretary, State Board of Cosmetology;

(2) The Secretary of the State Board of Registration for Professional Engineers; and

(3) The Administrator of the Oklahoma Securities Commission.

§ 803.2. State Department of Education personnel included in unclassified service.—In addition to those offices and positions in the unclassified service of the state as now provided by law, personnel occupying the following offices and positions in the State Department of Education shall be included in the unclassified service of the state:

Deputy State Superintendent of Public Instruction; Administrative Assistant; Assistant State Superintendent of Public Instruction and Director—Federal Financial Assistance Programs Division; Assistant State Superintendent of Public Instruction and Director—School Finance Divison; Assistant State Superintendent of Public Instruction of the Instructional Division; Administrator of Communications; Informational Representative III; Director of Instructional Programs; Director of Elementary Education Programs; Director of Secondary Education Programs; Assistant Director—School Finance Division; School Lunch Program Administrator; Indian Education Administrator; Administrator, State Aid Section; Administrator—State Textbook Section; Administrator—School Transportation Section; Administrator of Curriculum Section; Guidance and Counseling Section Administrator; Administrator of Educational Television and Instructional Media Section:

Administrator of Safety, Driver Education, Health and Physical Education Section; Administrator of Special Education Section; Administrator of Teacher Education and Certification Section; Administrator—Critical Subjects and Special Projects Section; Adult Basic Education Administrator; Administrator, Deprived and Disadvantaged Youth Section, Educational Planning Administrator; Administrator—Evaluation Section; Administrator—Human Relations Section; Administrator of Library Resources Section, State-Federal Programs Division; Administrator, Auditing Section, State-Federal Programs; Educational Research Administrator; Administrator—Supplementary Centers and Services Section; Data Processing Systems Analyst III; Data Processing Coordinator; Chief Examiner; Director of Federal Financial Assistance Programs; and Administrator of Narcotics and Drug Education.

The position of Supervisor, Director or Educational Coordinator in any other State Agency having a primary responsibility to coordinate educational programs operated for children in State Institutions may, at the option of the employing agency, be placed in the Unclassified Service.

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74 O.S. 1971, § 818. Discrimination and other prohibited acts.—No person in the classified service shall be appointed to, or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any

person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting the rights or prospects of any person with respect to employment in the classified service.

No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
APR. 21, 1972
REX B. HAWKS
Clerk, U. S. District Court
By JOANNE JOHANNING
Deputy

WILLIAM M. BROADRICK, ET AL., Plaintiffs,	)	
vs.	)	No. CIV-71-696
THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, ET AL., Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William M. Broadrick, Jimmy R. Ury, and Clive R. Rigsby, the Plaintiffs above named, hereby appeal to the Supreme Court of the United States from the Final Order entered by the Three Judge Court in this action on March 31, 1972, denying Plaintiffs' Motion for a New Trial on the Order entered in this action on February 28, 1972, denying the declaratory and injunctive relief prayed for in the Complaint pursuant to 42 U.S.C., §1983.

This appeal is taken pursuant to 28 U.S.C. §§1253 and 2284, and 42 U.S.C. §1984.

s/ John C. Buckingham

t/ John C. Buckingham
100 Park Avenue Building
Suite 1213
Oklahoma City, Oklahoma 73102

CERTIFICATE OF MAILING

I do hereby certify that on the 21st day of April, 1972, I mailed a full, true and exact copy of the within and foregoing Notice of Appeal to the Supreme Court of the United States in Civil 71-696, U. S. District Court for the Western District of Oklahoma, in the United States Mail with postage prepaid and addressed to the following:

Oklahoma State Personnel Board
407 Sequoyah Building
State Capitol
Oklahoma City, Oklahoma 73105

Keith B. Frosco
407 Sequoyah Building
State Capitol
Oklahoma City, Oklahoma 73105

Mr. Larry Derryberry
The Attorney General of Oklahoma
State Capitol
Oklahoma City, Oklahoma 73105

s/ John C. Buckingham

t/ John C. Buckingham

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees Within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL. THE OKLAHOMA STATE PERSONNEL BOARD, and its members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and its members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO AFFIRM

LARRY DERRYBERRY
Attorney General of Oklahoma
PAUL C. DUNCAN
Assistant Attorney General
Chief, Civil Division
Counsel for Appellees

July, 1972

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0036

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

MOTION TO AFFIRM

Comes now the appellees, the State of Oklahoma, *ex rel.* The Oklahoma State Personnel Board, and its members; and Larry Derryberry, Attorney General of the State of Oklahoma, and request this Court to affirm the ruling of the three-judge United States District Court for the Western District of Oklahoma whereby the court refused to enjoin Oklahoma's statutes prohibiting partisan political

activity on the part of certain State employees, and denied all relief sought by plaintiffs. The District Court's opinion is set out in full in the Appendix of the Jurisdictional Statement of appellants.

STATEMENT OF FACTS

Appellees are in substantial agreement with the sequence of events set forth in appellants' Jurisdictional Statement. With respect to that portion of the Jurisdictional Statement contained on page seven, appellees disagree that the three-judge Court had to narrowly construe the Act to prohibit only partisan "party" political activities in that the Act itself is narrowly drawn to convey the interpretation that partisan political activity alone is prohibited, the term "partisan politics" connotating party politics. With that exception, appellees are in agreement that the Jurisdictional Statement correctly reflects the Opinion of the three-judge Court filed on February 14, 1972. Appellees further stipulate that the Appendix is an accurate reproduction of the opinions, judgments and law which they purport to depict and the same are hereby adopted by the appellees, as a basis for this Court sustaining this Motion to Affirm.

ARGUMENT

This District Court's opinion found that the Oklahoma Legislature has the power to regulate, within reasonable limits, the political conduct of State employees in order to promote efficiency and integrity in the public service. In regulating said conduct provisions safeguarding State employees from the evils of political partisanship by provid-

ing prohibitions against involvement in partisan politics constitute a compelling governmental interest sufficient to justify some encroachment upon an individual's First Amendment rights. The District Court found that Oklahoma's prohibitions against partisan political activity were drawn so as to prohibit only those political activities relating to party politics. The questions presented by appellants in their Jurisdictional Statement relate to the wording of the statute and the fact that not all State employees are subject to the restrictions. Both of the questions presented will be briefly discussed.

PROPOSITION I

TITLE 74 O.S. 1971, §818, IS NARROWLY DRAWN TO PROHIBIT ONLY THOSE POLITICAL ACTIVITIES RELATING TO PARTY POLITICS.

The first question presented in appellants' Jurisdictional Statement concerns the wording of Section 818. Appellants assert the statute is broadly drawn to prohibit both partisan and non-partisan political activity. The District Court properly found this contention to be insubstantial both in fact and in law. See Findings of Fact 9-11, Jurisdictional Statement viii; Conclusions of Law 9, Jurisdictional Statement x. Appellants do not argue so much that the language is overbroad as they do that the Hatch Act, and the *Mitchell* case upholding it, no longer square with later civil rights decisions. The District Court correctly stated that an inferior court can never "erode" a decision of the United States Supreme Court. See Conclusions of Law 11, Jurisdictional Statement xi.

The key concepts in prohibiting partisan political activity on behalf of State employees are that the promotion, protection and preservation of the efficiency and integrity of the public service constitutes a compelling State interest and that partisan political activity by civil servants is a direct and viable threat to an efficient and honest public service. *Gray* v. *City of Toledo*, 323 F.Supp. 1281 (1971). In applying these concepts as the rationale behind the language, together with the language itself, there can be no doubt that the prohibitions are limited to partisan political activity. The use of the words "political" and "politics" can refer to "the science of government and civil polity," or be used in the narrower sense of referring to "political affairs in a party sense." In enacting statutes of this nature it is clear that the words "politics" and "political" are used in the narrower sense of referring to "political affairs in a party sense." In addition, where the words "politics" and "political" are modified by an adjective that connotes partisanism, the restricted activity is non-protected speech under the guidelines set forth by this Court in *United Public Works of America* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 456, 91 L.Ed. 754 (1947). *Gray* v. *City of Toledo, supra*. The purpose and intent of enacting such a statute prohibiting political activity on the part of State employees is to safeguard against the evils of political partisanship. In looking at the purpose of a statute this Court has held for the proposition that:

> "We should give the language a meaning if the words will bear it, which carries out the purposes of the statute, even though this is not the literal meaning of the words when considered in isolation." *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 60

S.Ct. 1059, 84 L.Ed. 1345 (1941); *United States* v. *Shirey*, 359 U.S. 255, 79 S.Ct. 746, 3 L.Ed.2d 789 (1959).

Again, in *Richards* v. *U. S.*, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), this Court said:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and its object and policy."

See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 100 L.Ed. 309, 76 S.Ct. 349 (1956); *United States* v. *Boisdore's Heirs* (U.S.), 8 How. 113, 12 L.Ed. 1009.

Section 818 of the Oklahoma Merit System of Personnel Administration does not prohibit State employees from participating in non-partisan political activities and does not restrict public and private expressions on public affairs and personalities, not an objective of party action, so long as the employee does not channel his activity towards party success. Appellants rely heavily on the recent case of *Hobbs* v. *Thompson*, 448 F.2d 456, wherein the Court makes no attempt to distinguish *Mitchell*, but states that *Mitchell* is no longer the law, even though this Court has not ruled on the question since *Mitchell*. Appellees contend that *Mitchell* is the law, that the inferior court decisions relied upon by appellants have not eroded that decision of this Court, and that the rationale behind the decision in *Mitchell* is as valid today as when rendered.

PROPOSITION II

PLAINTIFFS ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

Appellants contend that they are denied the equal protection of the law in that they are denied the rights granted to all other citizens without justification for the distinction. As stated by the Court in *Bagbey* v. *Washington Township Hospital Dist.*, 421 P.2d 409 (Cal. 1966):

> "The governmental employee should no more enjoy the right to wrap himself in the flag of constitutional protection against every condition of employment imposed by the government than the government should enjoy an absolute right to strip him of every constitutional protection. Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of public-conferred benefits despite a resulting qualification of constitutional rights."

The right of the State to prohibit the political activities of State employees has long been upheld. The Court in *Mitchell, supra,* explained it thusly:

> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing edu-

cational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

The Equal Protection Clause does not require exactly equal treatment of all citizens. The Legislature may create certain classes and make laws applicable to some but not all of the classes, provided that the principle of classification rests upon some real difference which bears a reasonable and just relation to the ends sought to be accomplished by the legislation. The line between the classified and unclassified civil service coincides with the classification of ministerial and policy-forming public officers, and policy-forming public officers should reflect the popular will and to do so must engage in politics, but ministerial employees have nothing to do with forming public policy and are best able to perform their activities when separated from the uncertainties of political influence, which require that they be forbidden to take a public and prominent part in the activities of political parties and in election campaigns.

The evils of partisan politics in State government balanced against the political rights of State employees as citizens require the regulation of the political conduct of State employees in order to promote efficiency and integ-

rity in the public service. The District Court properly found that appellants' Fourteenth Amendment rights were not violated. See Conclusions of Law 4, Jurisdictional Statement ix.

CONCLUSION

The lower court properly adhered to all constitutional principles governing prohibitions against State employees being involved in partisan politics. It must be remembered that the requirement placed upon a court of three judges while entertaining a suit to enjoin enforcement of a State statute is to insure that the statute shall not be suspended by injunction except upon a clear and persuasive showing of unconstitutionality and irreparable injury. *Mayo* v. *Lackland Highlands Canning Company*, 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774 (1940).

The findings of fact and conclusions of law of the lower court indicate no persuasive showing to support any of the complaints raised by appellants. All issues raised were properly decided by the lower court. Accordingly, a full hearing of this case, including briefs and oral argument, is not necessary to a proper decision by this Court. Appellees respectfully request that the judgment of the District Court be affirmed.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma

PAUL C. DUNCAN
Assistant Attorney General
Chief, Civil Division
Counsel for Appellees

July, 1972

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

Mr. Terry Shipley
119½ South Third Street
Noble, Oklahoma 73068

Mr. John C. Buckingham
Suite 1213
100 Park Avenue Building
Oklahoma City, Oklahoma 73102

Counsel for Appellants

all parties required to be served, by mailing such true and correct copies, postage prepaid, this _____ day of July, 1972.

_____

Paul C. Duncan

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Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, and NATHAN A. SAMS, Chairman, A. E. PLUME, Vice-Chairman, TOM R. MOORE, Member, RAYMOND H. FIELDS, Member, E. W. HARPER, Member, JOSEPH TURNER, Member, and MRS. JOHN D. (HELEN) COLE, Member, in their individual capacities and as members of the defendant Oklahoma State Personnel Board; and KEITH B. FROSCO, Director of the Oklahoma State Personnel Board; and the CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CHARLES NESBITT, Chairman, RAY C. JONES, Vice-Chairman, and WILBURN CARTWRIGHT, Member, in their individual capacities and as members of the defendant Corporation Commission; and LARRY DERRYBERR, Attorney General of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLANTS

JURISDICTION

This is a civil class action for declaratory and injunctive relief to enjoin the deprivation of the civil rights of

Appellants and all classified employees of the State of Oklahoma, and is authorized by 42 U.S.C. §1983. The Appellee, Oklahoma State Personnel Board, initiated proceedings against each Appellant under color of 74 O.S. 1971 §818 to dismiss each Appellant from his employment with the Corporation Commission of the State of Oklahoma for alleged political activities. Appellants are accused variously of soliciting campaign contributions, seeking out others to engage in political activities and transporting campaign posters. Appellants contend that the blanket prohibitions against political activities in the statute unjustifiably encroach upon the Appellants' First Amendment rights of free speech, assembly and press, and denies equal protection of the laws in that it denies that group of citizens the rights granted to all other state employees and all other citizens, and there is no justification for the distinction. Appellants also contend that the statute divests those classified employees of Fifth and Fourteenth Amendment guarantees of due process of law in that Appellants are denied political liberty without justification. The decision of the Three Judge Court of the United States District Court for the Western District of Oklahoma sustained the validity of 74 O.S. 1971 §818.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1253 inasmuch as this proceeding challenges the constitutionality of a State statute, and 28 U.S.C. §2281 requires a District Court of Three Judges to determine the issue.

STATEMENT OF THE CASE

Appellants, William H. Broadrick, Jimmy R. Ury and Clive R. Rigsby, are employees of the Corporation Commission of the State of Oklahoma, an agency and instrumentality of the State. They are residents of the State of Oklahoma and of the United States.

The 1959 Oklahoma Legislature enacted the Oklahoma Merit System of Personnel Administration Act, 74 O.S.A. §801, *et seq.*, which placed the employees of certain named state agencies within the classified service for the stated purpose of rendering their employment subject to merit rather than political allegiance. The Act prohibits the designated agencies from dismissing or suspending classified employees for political reasons, but it authorizes the State Personnel Board to effect dismissal or suspension of a classified employee who is politically active, and even prohibits the expression of political sentiments other than private expressions.

On October 18, 1971, the Personnel Board formally accused each Appellant of prohibited political conduct during the 1970 re-election campaign of Corporation Commissioner Ray C. Jones. The Appellants then sought injunctive and declaratory relief in the United States District Court for the Western District of Oklahoma challenging the constitutional validity of that part of the Oklahoma Merit Act which prohibits political expressions and activities on the part of classified employees as violating their First Amendment rights of free speech, assembly and press; and their Fifth and Fourteenth Amendment rights to equal protection and due process of law.

A Three Judge Court was convened to hear and determine the case. The Court dismissed the cause of action. In so doing, the Court narrowly construed the Act to prohibit only partisan *party* political activities and found that the statute does not restrict public expressions on public affairs and personalities so long as the employee does not channel his activity towards party success.

QUESTIONS PRESENTED

I. May a State constitutionally broadly prohibit State employees from:

(1) Freely and publicly expressing opinions regarding any political party or any political campaign?

(2) Taking part in any political campaign?

(3) Taking part in the management or affairs of any political party?

(4) Being a candidate for nomination or election to any paid political office?

(5) Being an officer or member of a committee of a partisan political club?

(6) Being a member of any national, state or local committee of a political party?

(7) Being concerned in any manner in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose?

II. May a State constitutionally classify the employees of some, but not all, of its state agencies and broadly prohibit the employees of those agencies from engaging in the activities described above while permitting the unclassified employees of the State, all other public employees and the citizenry at large to freely engage in those activities?

OPINION BELOW

The written Memorandum Opinion below was entered on February 14, 1972, and is officially reported as *William M. Broadrick, et al.* v. *The State of Oklahoma, ex rel. The Oklahoma State Personnel Board, et al.*, 338 F.Supp. 711. The opinion is reproduced in the Appendix to the Jurisdictional Statement beginning on page i.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Appeal involves the First, Fifth and Fourteenth Amendments to the United States Constitution which provide:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This Appeal also involves 74 O.S. 1971 §§802, 803, 803.1, 803.2 and 818, which are printed *verbatim* at pages xii through xviii of the Jurisdictional Statement.

ARGUMENT

74 O.S. 1971 §818, sixth and seventh unnumbered paragraphs, is the Oklahoma counterpart to the Federal Hatch Act, 5 U.S.C. §7324 (a). Section 818, *supra*, applies only to "Classified Employees" of the State of Oklahoma. The employees of many state agencies are unclassified and exempt from the proscriptions of the two challenged paragraphs, see Sections 802, 803, 803.1 and 803.2 of Title 74 O.S. 1971, set forth at pages xii through xvi of the Jurisdictional Statement.

The employees subject to the Act are expressly permitted to *privately* express their opinions upon political subjects and to cast their vote at an election. All other political expressions and conduct are prohibited in the broad and vague terms of §818, *supra*. The sixth and seventh unnumbered paragraphs of §818, *supra*, read as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

The issues before this Court may be gathered together in one simple statement: do the prohibitions contained in the sixth and seventh unnumbered paragraphs of Section 818, *supra*, violate the rights of the plaintiffs guaranteed them by the First and Fifth and Fourteenth Amendments of the Constitution of the United States.

The extent to which a legislative body may proscribe political conduct and behavior of classifications of employ-

ees of a city government, state government or federal government has been an issue before the courts since at least 1946. The frequency with which the courts are forced to decide this issue has in the last several years accelerated. Yet, the extent to which a legislative body may proscribe the political conduct and behavior of governmental employees remains in grave doubt and uncertainty. Thus the notation of probable jurisdiction by this Court in the case at bar and in *National Association of Letter Carriers, AFL-CIO* v. *United States Civil Service Commission*, 346 F.Supp. 578, is timely.

In 1946, the United States Supreme Court rendered its decision in *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, which held that insofar as the so-called Hatch Act, Section 7324 (a), *supra*, prohibited a governmental employee from serving as a ward executive committeeman of a political party who was politically active on election day as a worker at the polls and a paymaster for the services of other party workers, the Hatch Act did not violate the constitutional rights of the employee.

Since the date of the *Mitchell* case, *supra*, the United States Supreme Court has rendered decisions which have been used by lower federal courts and state courts as a basis for reaching a decision inconsistent with the *Mitchell* case, *supra*. These United States Supreme Court cases are: *Wieman* v. *Updegraff*, 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215; *NAACP* v. *Button*, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328; *Sherbert* v. *Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790; *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116; *Keyishan* v. *Board of Regents*

of New York, 385 U.S. 589, 17 L.Ed. 629, 87 S.Ct. 675; and *Pickering* v. *Board of Education*, 391 U.S. 563, 10 L.Ed.2d 811, 88 S.Ct. 1731.

Fort v. *Civil Service Commission*, 38 Cal.Rptr. 625, 392 P.2d 385, dealt with a provision of the charter of Alameda County, California. The specific language dealt with is as follows:

> "No officer or employee of the County in the classified civil service shall directly or indirectly make, solicit or receive, or be in any manner concerned in making, soliciting or receiving any assessment, subscription or contribution for any political party or any political purpose whatsoever. No person holding a position in the classified civil service shall take any part in political management or affairs in any political campaign or election, or in any campaign to adopt or reject any initiative or referendum measure other than to cast his vote or to privately express his opinion. Any employee violating the provisions of this section may be removed from office." 392 P.2d at 386.

Fort became chairman of a speakers' bureau for the Contra Costa Committee to re-elect Governor Brown and was dismissed from his employment as Director of the Center for Treatment and Education on Alcoholism, County of Alameda, for violation of the above quoted section of the charter of Alameda County.

After reviewing the holding of the United States Supreme Court in the *Mitchell* case, *supra*, the Supreme Court of California with great reliance on *Sherbert* v. *Verner*, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790, held that the above quoted charter provision in violation of Fort's First Amendment rights. Stated the Court:

"* * * We are satisfied that, in the light of the principles applicable to the freedom of speech and the related First Amendment rights, no sound basis has been shown for upholding a county provision having the breadth of the one before us, which, as we have seen, applies alike to partisan and non-partisan activities and not only to county elections but to all elections and which is not narrowly drawn but is framed in sweeping and uncertain terms that accept only the right to vote and to express opinions 'privately.' " 392 P.2d at 389.

It is submitted that the rights of plaintiff Fort are no greater than the rights of the plaintiffs of the case at bar. It is further submitted that the language of Section 818, *supra,* in depriving the plaintiffs in the case at bar of their rights is almost identical to that of the Alameda County Charter provision referred to in *Fort* v. *Civil Service Commission, of the County of Alameda, supra,* in its denial of plaintiffs' constitutional rights.

Minielly v. *State of Oregon,* 242 Ore. 490, 411 P.2d 69, involved a deputy sheriff who announced his intention to become a candidate for county sheriff at the next election. In furtherance of his political ambitions, Mr. Minielly brought a declaratory relief action to declare unconstitutional the state statutes prohibiting a civil servant from running for elective public office and providing as a penalty for violating such prohibition automatic forfeiture of his civil service position and of his right to the public office. The specific legislative language in pertinent part, is as follows:

"* * * No person employed under civil service, or registered on the eligible list of the classified civil serv-

> ice, of any county coming under O.R.S. 241.020 to 241.990 shall be a candidate for popular election to any public office, unless such person immediately resigns from the position which he then holds under civil service, or, in the case of persons on the eligible list of the classified civil service, unless such persons immediately have their name stricken from such eligible list."

Thus, the Oregon Statute in question in the *Minielly* case, *supra*, is pertinent to the case at bar in that an employee in the classified service in Oklahoma who ran for public office would more than likely "directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose." In addition such employee would specifically be "a candidate for nomination or election to any public office" and would "take part in the management or affairs of any political party or in any political campaign." (Quotations from the sixth and seventh unnumbered paragraphs of Section 818, *supra*).

The Oregon Supreme Court after referring to *Mitchell, supra,* and *State of Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127, 91 L.Ed. 794, 67 S.Ct. 544, referred to what it called "new concepts of statutory interpretation and construction in the area of First Amendment rights" and cited *NAACP* v. *Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328; *Sherbert* v. *Verner, supra,* and *Wieman* v. *Updegraff,* 344 U.S. 183, 97 L.Ed. 216, 73 S.Ct. 215, and others. The Court stated:

> "It is apparent from the cases heretofore discussed in this opinion that a revolution has occurred in the law relative to the state's power to limit federal First

> Amendment rights. Thirty years ago the statutes now under consideration would have been held to be constitutional, particularly as applied to the factual situation in the present case. This is no longer possible in view of the intervening decisions of the United States Supreme Court. We hold the statutes unconstitutional because of overbreadth. We believe, however, that there would be a compelling state interest warranting the legislature to pass more narrowly drawn legislation. The present statute encompasses too broad a scope and would prevent the plaintiff from becoming a candidate for state, federal or nonpartisan office. It can not be demonstrated that the good of the public service requires *all* of the prohibitions of the present statute."

Kinnear v. *City and County of San Francisco,* 38 Cal.Rptr. 631, 392 P.2d 391, is a case on its facts identical with *Minielly* v. *State,* except arising out of the State of California and which reaches a conclusion identical with that reached by *Minielly* v. *State, supra.*

In the year 1966 the Supreme Court of California once again was called upon to render a decision having to do with political activities of an employee of a governmental agency invoking a so-called "political activity" statutory prohibition. In *Bagley* v. *Washington Township Hospital District,* 55 Cal.Rptr. 401, 421 P.2d 409, the Court held that a state statute providing that:

> "No officer or employee whose position is not exempt from the operation of a civil service personnel or merit system of a local agency shall take an active part in any campaign for or against any candidate, except himself, for an office of such local agency, or for or against any valid measure relating to the recall of any elected official of the local agency."

Plaintiff was a nurse's aid who had been discharged by the Township Hospital District. Nellie Bagley brought an action against the Washington Township Hospital District to enjoin the district from representing to its employees that participation in recall campaigns was unlawful and from threatening or instituting reprisals. Ms. Bagley also sought reinstatement of back wages and punitive damages. The trial court sustained a demurrer to the petition and the Supreme Court of California was urged by the district to affirm the sustaining of the demurrer. The Supreme Court of California, however, chose to find and hold that the demurrer could not be sustained and in doing so, stated:

> "The public employee surely enjoys the status of a person protected by constitutional right. Public employment does not deprive him of constitutional protection. In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, such protections are not subject to destruction by a public employer's insistence that they be waived by contract."

The Court goes on to say:

> "In summary we note that the expansion of government enterprise with its ever-increasing number of employees marks this area of the law a crucial one. As the number of persons employed by government and governmentally-assisted institutions continues to grow the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it. Restrictions on public employees which, in some or all of their applications, advance no compelling public interest commensurate with the waiver of constitutional rights which

they require imperil the continued operation of our institutions of representative government."

A series of precedents had been set in the States of California and Oregon concerning the so-called "political activities" prohibition which were then swept to the State of New Jersey. In the year 1967, the Superior Court of New Jersey in *DeStefano* v. *Wilson*, 96 N.J.Super. 592, 122 A.2d 682, held that a rule providing that no fireman shall take active part in politics or political contest or engage in controversy concerning candidates or issues, placed an unconstitutional burden upon the exercise of the First Amendment rights and liberties of the firemen and struck down a certain legislative rule of the fire department which provided:

> "No members shall take an active part in politics or political contests or engage in controversy concerning candidates or issues."

The New Jersey Court, citing precedents of the United States Supreme Court in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975, *Sweezy* v. *State of New Hampshire*, 354 U.S. 234, 1 L.Ed. 1311, 77 S.Ct. 1203, and referring to *Minielly* v. *State of Oregon*, *supra*, *Wieman* v. *Updegraff*, *supra*, *Fort* v. *Civil Service Commission of Alameda County*, *supra*, *Kinnear* v. *City and County of San Francisco*, *supra*, and *Bagley* v. *Washington Township Hospital District*, *supra*, held that such prohibition violated the plaintiff's rights guaranteed by the United States Constitution. The New Jersey Court stated:

> "The 'overbreadth' of Rule 128 is obvious. It is not drawn with that degree of specificity which is required

in order to sustain the restraints which it imposes upon the exercise of constitutional rights. Rule 128 effectively deprives plaintiff of his right as a citizen to participate in any phase of political life. It not only prevents him from running for public office and participating in political campaigns, but is *(sic)* also deprives him of his constitutional right to speak freely on public questions, issues and controversies. This is not consonant with the American tradition of recognizing an individual's right to 'speak out and be heard.' The court concludes that Rule 128 is unconstitutional."

In the year 1971, the United States District Court for the Northern District of Ohio, Western District, was asked to decide the issue. Members of the City Police Department brought a class action for declaratory judgment concerning the constitutionality of a State Statute, a City Charter provision, a Civil Service rule, and a City Police Department regulation pertaining to public employee's political activities. After wading through a quagmire of state statutes, city charter provisions, civil service rules and city police department regulations, the Court held that provisions of the police department regulations prohibiting employees from serving on political committees, promoting candidacy of persons, speaking at political meetings, soliciting votes, making public attack on candidates, circulating petitions for candidates and engaging in political discussions while on duty or in any station house with anyone, failed to meet constitutional requirements. The Court in *Gray* v. *City of Toledo*, 323 F.Supp. 574, cites the *Mitchell* case, *supra*, and states that:

"* * * This Court is constrained to follow these rulings." (323 F.Supp. at 1285)

The United States District Court in Ohio then goes on to state:

> "However, any restriction imposed by the government upon its employees' political activity must be directly related to the goal of prohibiting partisan political activity, the effect of which interferes with the efficiency and integrity of the public service. If no such relationship exists, the regulation must be struck down as violative of the first amendment rights of the employees. The more remote the relationship between a particular activity and the performance of official duty, the more difficult it is for the government to justify the restriction on the grounds that there is a compelling public need to protect the efficiency and integrity of the public service. Fort v. Civil Service Commission, 61 Cal.2d 331, 38 Cal.Rptr. 625, 392 P.2d 385 (1964); Minielly v. Oregon, 242 Or. 490, 411 P.2d 69 (1966). In addition, a government's right to infringe upon first amendment rights must be so circumscribed as not, in attaining a legitimate end, to unduly infringe upon protected rights. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)." 323 F. Supp. at 1285.

The United States District Court then goes on to state that:

> "The first sentence of both the Charter provision and the Civil Service Rule prohibits the specified employees from soliciting or receiving contributions, etc. 'for any political party or political purpose. * * *' That portion dealing with 'political purpose' is ambiguous—it encompasses both protected and non-protected activity and is, therefore, overreaching. The phrase 'political purpose', which is presented in the disjunctive, is not limited to conduct regarding partisan officers and issues but relates equally to all candidates and

questions, whether or not they are identifiable with a political party. Fort v. Civil Service Commission, supra; Kinnear v. City of San Francisco, 61 Cal.2d 341, 38 Cal.Rptr. 631, 392 P.2d 391 (1964). The latter activity is, of course, protected speech. Its bearing upon the efficiency and integrity of the public service is dubious at best and is violative of the plaintiffs' first and fourteenth amendment rights."

And at page 1288, the Court states further:

"Ambiguous words touching upon first amendment rights also suffer the constitutional infirmity of vagueness. The naked use of the words 'political' and 'politics' leaves a police officer in a very precarious position. He must venture a guess as to which activities are encompassed by these words as used in Rule 12. Once he acts, he does so at his peril, always in fear that his superiors in the department will not agree with his particular interpretation of the Rule. Or of equal importance, he could engage in self-censorship by denying himself the opportunity to engage in protected political activity for fear that such activity would later be deemed activity which is not protected by the first amendment. cf. Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). This problem of vagueness is not remedied by saying that the policeman could first request a reading as to the propriety of his actions from his supervisors. This would vest his supervisors with unfettered discretion in determining which desired activity is permissible under the Rule."

The Court then concludes with the holding that the rule or regulation of the police department does not exclude from its operation public criticism of the police de-

partment or public officials that is not of a disruptive nature and it is therefore unconstitutional on the basis of vagueness, as well as its being overreaching. The Court states, and this is very important, at page 1289, that:

> "* * * Not only is the restriction applicable to both partisan and nonpartisan political discussion, but the City has no legitimate interest in restricting an employee's right to discuss partisan politics during working hours. This is an unconstitutional gagging of a policeman's right to free speech and expression. The Hatch Act reserves to the employee the right to express his opinion on all political subjects and candidates so long as such activity is not directed towards party success. United Public Workers of America v. Mitchell, supra, 330 U.S. 75, at 100, 67 S.Ct. 556, 91 L.Ed. 754. The City of Toledo cannot go beyond this limitation."

Gray v. *City of Toledo, supra,* has been cited both in Appellee's trial brief and in the trial court's Memorandum Opinion in the case at bar. Appellants are at a loss to understand how, from a thorough reading of *Gray* v. *City of Toledo, supra,* such opinion and decision can be cited as in support of their argument and judgment respectively.

Gray v. *City of Toledo, supra,* was decided in March, 1971. In September of the same year, the United States Court of Appeals for the Fifth Circuit in *Hobbs* v. *Thompson,* 448 F.2d 456, was met with a very similar issue and it is submitted has rendered the most exhaustive analysis with respect to this issue to date.

Various individual firemen, including plaintiff, had attached to their automobiles bumper stickers which evidenced support for a particular candidate in the state's

General Assembly primary election. After two firemen were temporarily relieved from duty, all of the firemen were ordered to remove their bumper stickers under the authority of a certain provision of the Macon, Georgia City Charter which provided that no employee of the City's fire department

> "shall take an active part in any primary or election and all (such) employees are hereby prohibited from contributing any money to any candidate, soliciting votes or prominently identifying themselves in a political race with or against any candidate for office."

The City Charter of Macon, it might be added, provided for certain prescriptions which were somewhat less severe than the Oklahoma Statute concerned in the case at bar in that it provided for a reprimand, deduction of pay, suspension from duty, reduction in rank, dismissal from the department, or any one or more of said penalties. This type of prescription it is suggested is much more flexible and fair than the prescription set forth by the Oklahoma law which is simply dismissal from employment. (The last unnumbered paragraph of §818, *supra*, at p. xviii of the Jurisdictional Statement.) The opinion rendered by the Honorable Goldberg, Circuit Judge of the United States Court of Appeals for the Fifth Circuit sets forth an exemplary brief of the law surrounding the issue at hand in the case at bar and if this Appellant may be permitted, it would adopt the analysis of Judge Goldberg by reference.

Of particular significance, Appellant refers this Court to the language of *Hobbs* v. *Thompson, supra,* wherein the Court states:

"* * * But, as *Pickering* teaches us, where the political activities of the public employee are unrelated to the performance of his duties he is to be treated for purposes of adjudicating his first amendment rights as a 'member of the general public', 391 U.S. at 572-573." 448 F.2d at 475.

Mancuso v. *Taft* was decided in April, 1972, by the United States District Court for the District of Rhode Island and is reported at 341 F.Supp. 574. A police officer who became a candidate for nomination for representative to state General Assembly was in apparent violation of sections of the city charter and he sought injunctive relief enjoining city officials from suspending or removing him from classified service and for a declaration that such charter provisions were unconstitutional. Both sides filed motions for summary judgment and the United States District Court held that the city charter provisions which prohibited any officer or employee of the city from becoming a candidate for nomination or election to any public office and from taking any part in the conduct of any political campaign, and which were not limited to partisan political activity or candidacy, were unconstitutional for violation of the First Amendment. Consequently, the plaintiff's motion for summary judgment was granted.

In *Mancuso* v. *Taft, supra,* the Court deals extensively with *Mitchell,* and after considerable analysis and soul-searching states:

"* * * There comes a point where the vitality of a case, though that case has not been expressly overruled, may be seen to have been vitiated by the force of subsequent decisions. I believe that point has been

reached. In the conflict between adherence to the doctrine of stare decisis and my obligation to apply the Constitution as an organic document evolving with the society it governs, I conclude, after much troubling thought and concern, that the Mitchell standard of review, in justice, cannot be applied here."

It is submitted that in its essence *Mancuso* v. *Taft, supra,* cannot be distinguished from the case a bar.

Finally comes the decision and opinion rendered by the United States District Court for the District of Columbia in *National Association of Letter Carriers, AFL-CIO* v. *U. S. Civil Service Commission,* D. C., 346 F.Supp. 578. Herein a Court finally found the specific "political activities" language of the Hatch Act, *supra,* to violate the rights guaranteed to individuals by the Constitution of the United States. The "chilling effect" doctrine is treated with considerable attention. *Hobbs* v. *Thompson, supra,* and *Mancuso* v. *Taft, supra,* are cited. Finally the Court states that:

> "Accordingly, the Court declares 5 U.S.C. § 7324(a)(2) of the Hatch Act unconstitutional in that its provisions are impermissibly vague and overbroad when measured against the requirements of the First Amendment to the Constitution. The injunction against enforcement is granted and a stay of this Order is granted pending determination by the Supreme Court of the United States. So ordered."

Determination by the Supreme Court of the United States is at hand.

The court below in the case at bar relied strictly upon *Mitchell, supra,* and *Gray* v. *City of Toledo, supra.* No treatment whatsoever was given to the other cases cited herein

and the court below fails to analyze or discuss the basic issues underlying the rights of the plaintiffs guaranteed by the First, Fifth and Fourteenth Amendments of the Constitution of the United States. (The opinion of the court below is set forth in *verbatim* at the appendix pages i through xi of the appendix to the Jurisdictional Statement herein.)

The Oklahoma Merit System of Personnel Administration Act is similar in most respects to the Federal Civil Service Act (Hatch Act), and the civil service and merit acts of many states, counties, municipalities and other governmental sub-divisions. It typifies efforts over the past few decades to correct the evils of the spoils system of government. They attempt to achieve basic standards of competency in filling positions of employment in government rather than filling those positions on the basis of political loyalty and allegiance to successful candidates and political parties. They are designed to attract more qualified personnel by insuring job security free of the political fortunes and vicissitudes of the elective process.

The statute challenged herein prohibits discrimination against a classified employee for political reasons; it prohibits political coercion against a classified employee; it prohibits political extortion. Plaintiffs do not challenge those admittedly commendable features of the statute.

Plaintiffs challenge those portions of the statute which attempt to render classified employees politically sterile; which prohibit them from freely expressing their views about any and all political issues and candidates; which prohibit them from taking *any* part in the affairs of any

political party or *any* political campaign; which prohibit them from being interested in any manner in soliciting or receiving contributions for any political party or any political campaign at any level of government—national, state, county, municipal or school district. The statutory language is so vague and broad that the defendant State Personnel Board has even, by rule, prohibited classified employees from wearing lapel buttons and displaying bumper stickers on vehicles operated or controlled by them, and has, by the proceedings against these plaintiffs, implied that a classified employee may not even transport campaign posters. (See Defendant's Exhibit 1 at page 237 of Record on Appeal.)

No compelling state purpose is served, nor is any legitimate purpose of the Merit Act served, in prohibiting a classified employee from freely expressing his convictions concerning candidates for public offices, national, state and local, which exercise functions that vitally affect the life of each citizen, including each classified employee. Interest and participation in political campaigns for or against candidates or issues is the hallmark of good citizenship. Apathy—not active interest—is the real enemy of democracy. Paradoxically, an unchallenged portion of Section 818, *supra*, expresses a legitimate purpose of the Act by prohibiting discrimination against a classified employee because of his political opinions or affiliations. The challenged paragraphs contradictorily render the expression of those opinions or affiliations ground for dismissal from employment.

CONCLUSION

In conclusion, plaintiffs respectfully submit that the pertinent portion of the Oklahoma Merit System of Personnel Administration Act is inherently distinguishable from the pertinent portion of the Hatch Act and to the extent it is distinguishable, said Act is sufficiently overbroad and sufficiently vague and the classification sufficiently arbitrary that the rights guaranteed plaintiffs by the First, Fifth and Fourteenth Amendments of the United States Constitution makes said provisions unconstitutional. In addition, plaintiffs submit that *Mitchell, supra,* fails to enunciate the current law as said case applies to the First, Fifth and Fourteenth Amendment rights of the plaintiffs in the case at bar.

WHEREFORE, plaintiffs ask this Court to reverse the judgment of the trial court with instructions to enter an order enjoining the defendants from proceeding further in the dismissal actions against the named plaintiffs.

Respectfully submitted,

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Counsel for Appellants

January, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

The Honorable Larry Derryberry,
State Attorney General,
State Capitol Building
Oklahoma City, Oklahoma 73105

Keith B. Frosco, Director
State Personnel Board
407 Sequoyah Memorial Building
Oklahoma City, Oklahoma 73105

Jack Swidensky, General Counsel
and
Harvey Cody, Conservation Attorney
Oklahoma Corporation Commission
Jim Thorpe Building
Oklahoma City, Oklahoma 73105

all parties required to be served, by mailing such true and correct copies, postage prepaid, this 22 day of January, 1973.

TERRY SHIPLEY

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for Themselves and for the Class, "Classified Employees Within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL. THE OKLAHOMA STATE PERSONNEL BOARD, and Its Members; THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, and Its Members; and LARRY DERRYBERRY, Attorney General of the State of Oklahoma,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANSWER BRIEF

STATEMENT OF THE CASE

In 1959 the Oklahoma Legislature enacted the Oklahoma Merit System of Personnel Administration. Codified as 74 O.S. 1971, Sections 801 to 839, both inclusive, as amended, Section 818 provides:

"No person in the classified service shall be appointed to, or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious

opinions or affiliations or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

"No person shall use or promise to use, directly or indirectly, an official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

"No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

"No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting the rights or prospects of any person with respect to employment in the classified service.

"No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or

proposed promotion to, or any advantage in, a position in the classified service.

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

"Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the ap-

pointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply."

Paragraphs six and seven of Section 818 contain prohibitions against political activity. The Oklahoma State Personnel Board, created by Section 804 of the Merit System of Personnel Administration Act, is an agency of the State of Oklahoma and is authorized under Section 805 of the Merit Act to "Investigate alleged violations of the provisions of this Act and such rules and regulations as may be adopted subsequent thereto when deemed advisable."

Pursuant to said authority and paragraph eight of the Act the State Personnel Board met in open meeting on October 15, 1971, and voted unanimously that plaintiffs be charged with violating the provisions of Section 818 relating to prohibited political activity. On October 18, 1971, notices were sent to each of the plaintiffs specifying the charges made against them (Appendix, pages 7-11). On November 4, 1971, plaintiffs filed an action in the United States District Court for the Western District of Oklahoma contesting the constitutionality of Section 818. On November 16, 1971, after receiving a request for a hearing from plaintiffs, amended notices were sent to plaintiffs by the Personnel Board reiterating the charges against them and specifying the Oklahoma Statutes under which the hearing would be conducted (Appendix, pages 30-38). On December 1, 1971, pursuant to a request by plaintiffs for a more detailed description of the charges, the Personnel Board furnished more detailed descriptions by separate letters to each plaintiff (Pretrial Order at page 101 of Record on Appeal).

Upon application of plaintiffs to the Personnel Board for a stay of the hearings on the prohibited political activity charges against plaintiffs, the Personnel Board entered an order on December 16, 1971, continuing said hearings until the constitutionality of Section 818 had been determined by the District Court (Order of Board at page 89 of Record on Appeal).

A three-judge court was convened to hear the case and on February 14, 1972, the Court issued its Memorandum Opinion upholding the constitutionality of paragraphs six and seven of Section 818 (Jurisdictional Statement, pages ii-xi). From that decision plaintiffs lodged a timely appeal with this Court which issued an order noting probable jurisdiction on December 11, 1972.

INTRODUCTION AND SUMMARY

Although appellants urge that the sixth and seventh unnumbered paragraphs of 74 O.S. 1971, §818, are unconstitutional under the First, Fifth and Fourteenth Amendments of the Constitution of the United States, and that this Court's holding in *United Public Workers* v. *Mitchell*, 330 U.S. 75, is no longer valid due to its being eroded by lower federal court decisions, the issues raised in this case do not question the right of the State of Oklahoma to constitutionally restrict state employees' active involvement in political partisanship. The issues that are raised relate to the method chosen by the State of Oklahoma to define the prohibited political activities and whether said statutory enactment was drawn with enough specificity to appraise reasonable men of the extent of the prohibitions and

to insure that constitutionally protected rights are not proscribed.

Enacted in 1959 Section 818, modeled after the Federal Hatch Act which prohibits certain partisan political activities of federal employees, provides in unnumbered paragraphs six and seven as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his veto."

The objectives in providing such prohibitions are to insure the immunity of civil service from political control in order to promote, protect and preserve the efficiency and integrity of the public service. *Mitchell, supra.*

Not only do such prohibitions allow our state government to function free from political parties' attempts to use state employees as a tool to achieve party goals, and thus interfere with efficiency and objectivity of state gov-

ernment, they also provide a means of protecting the employees from direct and indirect political pressure. The rationale for having a merit system of personnel administration in Oklahoma is based upon the concept of employees working in an environment where progress is achieved through their own merit, free from the influences of politics. In order to achieve this goal the nature of the prohibition has to be all inclusive; to adopt a lesser standard would allow the subtle pressures of politics to control the employee and state government.

The District Court correctly ruled that the prohibitions against political activity contained in Section 818 are not vague or overbroad. In holding that said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten the efficiency and integrity of the public service and do not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success, the Court gave effect to the provisions of the statute and the intent of the Oklahoma Legislature. The provisions do not attempt to set out all factual situations that would fall within the prohibitions, the impossibility of that being evident; they do, however, provide specific guidelines to the employees so that they are adequately informed. In the administration of the provisions by the State Personnel Board, the Board provides advisory opinions upon request and circulates written materials to all state employees defining specific situations where the prohibitions apply, as derived from prior hearings under the statute, State At-

torney General's opinions, rules of the Board and Section 818 itself.

The State Personnel Board has authority to enact rules and regulations to give effect to the provisions of Section 818. (74 O.S. 1971, §§805(2), 839). The enactment of rules to set forth definitions of what is active participation in partisan politics gives the State Personnel Board the ability to alter these definitions to be consistent with First Amendment rights as determined in rulings by this Court. Any constitutional defect in those definitions could be raised by aggrieved employees in court on a definition by definition basis. To abrogate this method of keeping employees informed of prohibited activities would force the State to cover all possible situations by statute, an impossible task that, in time, would leave the State with fixed definitions perhaps constitutionally defective in light of this Court's future decisions in the area of the First Amendment. The advantage to providng all prohibited situations by statute would be questionable as far as informing employees of the nature of the prohibitions. The system in effect adequately informs the employee of the application of a factual situation to the law. The prohibitions contained in Section 818 are not unconstitutionally vague or overbroad.

The governmental interest in keeping the evils of partisan politics out of state government while allowing the citizens of Oklahoma to have their will expressed through some state employees is a reasonable and just distinction for having the political activity provisions apply only to the class of employees under the merit system.

ARGUMENT

I.

THIS COURT'S DECISIONS CONCERNING THE FEDERAL HATCH ACT AND THEIR EFFECT ON SECTION 818.

In *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, this Court reviewed the Federal Hatch Act prohibitions against active involvement in partisan politics and made the following observations:

(1) That Congress has the power to regulate, within reasonable limits, the political conduct of federal employees, in order to promote efficiency and integrity in the public service, 330 U.S. at 96-103;

(2) that the constitutional guarantees of free speech and association are not absolutes—a court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evil of political partisanship by governmental employees, 330 U.S. at 95-96;

(3) that the Hatch Act allows federal employees to participate in poltical decisions at the ballot box and prohibits only the partisan activity that would threaten efficiency and integrity and does not restrict public and private expressions on public affairs and personalities, not an objective of party action, so long as the employee does not channel his activity towards party success, 330 U.S. at 99-100;

(4) that the determination of the extent to which the political activities of governmental employees shall be regulated lies with Congress and courts will interfere only when the regulation passes beyond the permissible limitations, 330 U.S. at 102.

In sustaining the constitutionality of the Hatch Act prohibitions against federal employees, the Court in *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, also upheld the application of the Act as against state employees working in federally funded programs. Accepting the ruling of the Court in *Oklahoma*, the Oklahoma Legislature in 1959 enacted the Oklahoma Merit System of Personnel Administration and included prohibitions against active partisan political activity on the part of those state employees under the protection of the Merit System. Since not all state employees are under the protection of the Merit System, the prohibitions in paragraph six of Section 818 against "unclassified" employees relate to their soliciting monies for partisan politics from classified employees.

The intent of the Oklahoma Legislature in enacting a Merit System with prohibitions against partisan politics was to provide protection to the state government and employees against the evils of partisan politics that had been in effect prior to 1959. Being very cognizant of this Court's decisions in *Mitchell* and *Oklahoma*, the State utilized the language of the Federal Hatch Act. The case at bar is the only time the statute has been construed by any court and it is only the second time in the history of the prohibitions that any charges have been brought against state employees for violating same. The State of Oklahoma has been relying on this Court's decisions in *Mitchell* and *Oklahoma* as a basis for the validity of its prohibtions and the rule-making authority of the State Personnel Board to keep political activity definitions in line with the Court's First Amendment decisions.

II.

THE POLITICAL ACTIVITY PROHIBITIONS IN 74 O.S. 1971, §818, ARE NOT UNCONSTITUTIONALLY VAGUE OR OVERBROAD.

In ruling on the issues raised by the plaintiffs in District Court, the three judge panel correctly held that Oklahoma's political activity provisions are not unconstitutionally vague or overbroad. From the testimony of witnesses and the introduction of exhibits, the District Court found as a matter of fact that reasonable men do not differ as to the interpretation of the provisions of paragraphs six and seven of Section 818; that said prohibitions are understood by reasonable men to prohibit state employees from being involved in prescribed partisan political activity and that they do not prohibit state employes from being involved in non-partisan political activity. (District Court Opinion, page viii of the Jurisdictional Statement). The Court below appropriately found as a conclusion of law that the constitutional guarantees of free speech and association are not absolutes and this Court must balance the extent of these freedoms against a legislative enactment designed as a safeguard against the evils of partisanship by state employees. A government's interest in avoiding the danger of having promotions and discharges of civil servants motivated by political ramifications rather than merit is highly desirable. This interest is of such importance that it may properly be classified as a compelling governmental interest, and a showing of a compelling government interest is sufficient to justify some encroachment upon an individual's First Amendment rights. (District Court Opinion, page x of the Jurisdictional Statement). The Court further

found that the provisions of unnumbered paragraphs six and seven of Title 74 O.S. 1971, §818, prohibiting political activity by state employees, are directly related to the State's goal of prohibiting partisan political activity. Said provisions allow state employees to participate in political decisions at the ballot box and prohibit only the partisan activity that would threaten efficiency and integrity and do not restrict public and private expressions on public affairs and personalities so long as the employee does not channel his activity towards party success. These prohibitions do not unduly infringe upon protected rights under the First Amendment to the United States Constitution. (District Court Opinion, page x of the Jurisdictional Statement).

In answer to appellants' urging that *Mitchell* was no longer valid because of lower federal court decisions inconsistent with the *Mitchell* case, the District Court properly found their claim untenable in holding that an inferior court can never "erode" a decision of the United States Supreme Court. The premise of the Court's holding in *Mitchell* is still valid; the evil of partisan politics exists today as much or more than in 1946. The method utilized by the State of Oklahoma in prohibiting same is consistent with the constitutional rights of state employees.

A. PARAGRAPHS SIX AND SEVEN OF 74 O.S. 1971, §818, ARE NOT UNCONSTITUTIONALLY VAGUE.

Oklahoma's political activity prohibitions are attacked as being unconstitutionally vague; appellants contend they do not know the political activities in which they can participate or those that are prohibited. In *Grayned* v. *City of*

Rockford, 408 U.S. 104, 108-109, this Court examined the question of vagueness and set forth the following guidelines:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " (Footnotes omitted.)

The most obvious way to prevent a vagueness problem is to set out specifically all the prohibited activities. To have this as a constitutional requirement is neither practicable nor desirable. In being guided by the standards in *Grayned* we must first determine if a man of average intelligence can reasonably determine what is prohibited. This determination is not limited to scrutiny of the wording of the statute, but also interpretation of the statute by those charged with enforcing it and scrutiny of other au-

thoritative construction. *Ehlert* v. *United States*, 402 U.S. 99, 631-632; *Law Students Research Council* v. *Wadmont*, 401 U.S. 154, 162-163; *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96; *Gooding* v. *Wilson*, 405 U.S. 518, 520-521. While there have been no court cases interpreting the provisions of Section 818, the State Personnel Board informs all state employees under the Merit System of specific conditions where the prohibitions apply and what activities are not prohibited. In addition, the Board renders advisory opinions on request. While an advisory opinion would not in and of itself invalidate a facial attack on Section 818, it provides a means of ascertaining the effect of the prohibitions on political activity not covered under disseminated circulars or rules of the Board. *Seagrams & Sons* v. *Hostetter*, 384 U.S. 35, 49.

As the enforcing agency the Personnel Board is authorized to enact rules and regulations to give effect to the prohibitions in Section 818. Title 74 O.S. 1971, §805(2) provides in part for said Board to:

> "Adopt, initiate the adoption of, approve, modify, reject, or establish such rules and regulations as may be necessary to give effect to the merit system of personnel administration as contemplated by this Act . . ."

In addition Section 839 of Title 74 provides:

> "Any provision of this Act, or of Chapter 27, Title 74 O.S. Supp. 1959, §§801 to 819, inclusive, entitled 'Merit System of Personnel Administration,' which conflicts or is inconsistent with the federal rules, regulations, or standards governing the grant of federal funds to any agency or department is not applicable to such agency or department; the State Personnel Board

is authorized and directed to vary the terms of its rules and regulations as applicable to agencies and departments of the State receiving grants from the Federal Government, or any agency thereof, to the extent necessary to enable such agencies or departments to comply with the conditions for Federal Grants."

The Personnel Board has by rule defined prohibited activities under Section 818 (Appendix, pages 28, 29). Under Section 839 the Personnel Board is required to have its rules comply with federal requirements. Under *Oklahoma v. Civil Service Commission,* 330 U.S. 127, the conditions of federal grants require the application of the Hatch Act to state employees. Therefore, in enacting rules or interpreting the provisions of Section 818, the Personnel Board has to comply with Hatch Act provisions and is guided by same in the enforcement of the prohibitions.

The listing of prohibited and non-prohibited activities by the Personnel Board in circulars to state employees and definitive rules enacted under Section 818 do not, by any means, cover the whole area of prohibited political activity under the statute. The impossibility of listing in the statute or by rule the myriad activities that are contemplated in keeping the evils of partisan politics out of state government forces the State of Oklahoma to achieve is goal by setting up a system that will adequately advise employees of the prohibited acts. As stated by this Court in *Grayned v. City of Rockford,* 408 U.S. 104:

> "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity.' . . ."

The second standard set out in *Grayned* is that the law must provide explicit standards for those who enforce them. The Personnel Board is guided not only by the language of Section 818, which sets definable standards in regard to employees retaining their right to vote, publicly expressing opinions (not channeled towards party success) on issues and personalities, and allowing involvement in non-partisan political activity. In addition the Board is governed by those standards established by State Attorney General opinions, definitive rules enacted by the Board itself, and the direction given by the Federal Hatch Act provisions through Section 839, Title 74 of the Oklahoma Statutes and *Oklahoma* v. *Civil Service*.

Because of the nature of the prohibitions and the countless factual situations that would constitute a violation of the prohibitions, the Personnel Board, as do all other enforcement agencies, must apply the factual situation to the legal principles set out and determine if there has been a violation. In *National Association of Letter Carriers, AFL-CIO* v. *United States Civil Service Commission*, 346 F.Supp. 578, 595, Circuit Judge Mackinnon commented on the vagueness attack on the Federal Hatch Act in his dissent in saying:

> "The statutory standard here is in many respects analogous to a legislature's adoption of a criminal statute against such a common law crime as fraud—no attempt is made to define 'fraud'; rather the long-existent body of judicial interpretations of the concept of fraud are impliedly incorporated."

The third vagueness standard this Court set out in *Grayned* relates to the specificity required when regulating

First Amendment freedoms. Curtailment of state employees political activities does have a limiting effect on their First Amendment rights. Given the compelling governmental interest in keeping the evils of partisan politics out of state government, great care must be taken not to infringe too far upon those rights. As indicated previously, in addition to the language of the statute, state employees are guided by Personnel Board rules defining political activity and circulars distributed by the Board setting forth activity that is prohibited and activity that is not prohibited. State employees also have access to advisory opinions upon request. The vagueness concept in this instance turns on whether the state employees have adequate notice of the political activities prohibited in Section 818. In order to meet this notice requirement is the state obligated to set forth every conceivable form of political activity that is prohibited? We contend the standard is not that strict. "Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Products Corporation,* 372 U.S. 29.

The advantage to having these prohibited activities specifically set out by statute in order to give the state employees notice is questionable. Said enactment would not give the employees any more guidance than they now have on prohibited activities.

B. PARAGRAPHS SIX AND SEVEN OF 74 O.S. 1971, §818, ARE NOT UNCONSTITUTIONALLY OVERBROAD.

Vagueness and overbreadth arguments are closely related and are both used to invalidate statutes impermissibly encroaching on First Amendment rights. An overbroad statute is one which regulates constitutionally protected speech or conduct as well as that which is not constitutionally protected. As stated by this Court in *Younger* v. *Harris*, 401 U.S. 37, 51:

> "Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

This use of narrowing construction to exclude from the prohibitions contained in the statute constitutionally protected speech may be the approach this Court should take in construing Section 818. However, we feel that a correct interpretation of the intent of the Oklahoma Legislature will prevent facial invalidation. State employees need not restrict their First Amendment activities because of uncertainty about the prohibitions on their political activity. As we have previously shown, a state employee can understand what activities are prohibited; the facial prohibitions as further defined by rule, circular and advisory opinions allow an employee to ascertain the extent of the prohibitions.

In determining whether the specific provisions of Section 818 facially encompass constitutionally protected po-

litical activity we must look to the wording of the statute. Paragraphs six and seven of Section 818 provide:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Basically the problem lies with the use of the words "political" and "politics." Do these words refer to "the science of government and civil polity" or are they used in the narrower sense of referring to "political affairs in a party sense"? If the former is the proper interpretation, the provisions are overreaching. If, however, these words are used in a partisan sense, the activity which is prohibited is non-protected speech under the guidelines set forth by this Court in *Mitchell, supra.* Where the words "politics" and "political" are modified by an adjective that connotes partisanism, the restricted activity is not so protected. *Gray* v. *City of Toledo,* 323 F.Supp. 1281, 1288.

The provisions in paragraph six of Section 818 against solicitation or accepting any "assessment, subscription or contribution for any political organization, candidacy or other political purpose" are necessary prohibitions, the purpose of which is best expressed in *Ex Parte Curtis*, 160 U.S. 371, 375, wherein the constitutionality of this type of statute was considered. The Court there said:

> "If persons in public employ may be called on by those in authority to contribute from their personal income to the expenses of political campaigns, and a refusal may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in. So, too, if a part of the compensation received for public services must be contributed for political purposes, it is easy to see that an increase of compensation may be required to provide the means to make the contribution, and in this way the government itself may be made to furnish, indirectly, the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage. Political parties must almost necessarily exist under a republic form of government, and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power."

While the phrases "political organization," "candidacy" or "other political purpose" do not specify that the prohibition is against partisan politics only, the purposes and intent of enacting such a statute prohibiting political activity on the part of state employees is to safeguard against the evils of political partisanship.

In *U. S.* v. *State of Md. for Use of Meyer*, 349 F.2d 693, 695, the Court stated:

> "We should give the language a meaning, if the words will bear it, which carries out the purposes of the statute, even though this is not the literal meaning of the words when considered in isolation."

See *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542-544; *United States* v. *Shirey*, 359 U.S. 255, 260-261.

This Court in *Richards* v. *U. S.*, 369 U.S. 1, 11, said:

> "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and its object and policy.' "

See *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285; *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288.

We contend that the provisions of Section 818 as a whole and the very enactment of the provisions by the legislature to prohibit involvement in partisan political activity gives particular meaning to the phrases "political organizations," "candidacy" or "other political purpose" and limit their prohibition to partisan political activity.

In regard to the use of the phrase "political party" in paragraph seven of Section 818, the Court in *Cooper* v. *Cartwright*, 200 Okla. 456, 195 P.2d 290, 294, stated:

> " 'Political parties' are voluntary associations of electors having an organization and committee, and having distinctive opinion on some or all of the leading

poltical questions of controversy in the state, and attempting through their organizations to elect officers of their own party faith and make their political principles the policy of the government. They are governed by their own usages and establish their own rules."

Certainly this definition of "political party" does not include non-partisan political activity. In striving to make their political principles the policy of the government, persons belonging to said party clearly are promoting partisan needs. An employee of the state who was a member of a committee of said party would be involved in the very partisan political activity that the state prohibits. The prohibition pertaining to political party activity is partisan by definition and may properly be regulated. *Gray* v. *City of Toleda, supra.*

Neither can there by any question that the term "partisan political club" in paragraph seven of Section 818 properly prohibits non-protected speech under the guidelines set forth in *Mitchell, supra.*

The prohibition in paragraph seven above against an employee becoming a candidate for public office does not run counter to an employee's First Amendment rights. The right to engage in politics and political discussion is not absolute. The relinquishment of the right to become a candidate for public office may constitutionally be made a condition of public employment. *Gray* v. *City of Toledo,* 323 F.Supp. 1281, 1288; *Wisconsin State Employees Association* v. *Wisconsin Natural Resources Board,* 298 F.Supp. 339, 349-350; *Stack* v. *Adams,* 315 F.Supp. 1295; *Johnson* v. *State Civil Service Dept.,* 280 Minn. 61, 157 N.W.2d 747, 749-753.

The State Personnel Board in further defining the prohibition promulgated rule 1209.2 of the rules and regulations of the Merit System of Personnel Administration providing:

> "Any classified employee shall resign his position prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a political party, partisan political club or organization or serving as a member of any such group or organization."

In showing a compelling public need to protect a substantial public interest the Oklahoma Legislature could reasonably conclude that to allow employees in the competitive classified service to run for offices which are usually sought for the purpose of earning a livelihood or advancing one's political career would interfere with the efficient and impartial administration of public business by exposing employees and the merit system to the same type of political activities and abuses inherent in a spoils system, which the merit system was designed to obviate. Obviously, the Legislature could conclude that campaigning for such offices would inevitably interfere with the employee-candidate's time, energy, and devotion to his official duties. No one acquainted with the demands of a campaign for a county office, such as clerk of court, would deny that such demands could, and most likely would, affect a candidate's regular job performance. Undoubtedly, the Legislature was not unaware of the probability that an employee seeking such an office could use the prestige of the office he was seeking or his state office to gain special treatment from his superiors—such as leaves of absence

and special work assignments—or that his campaign activities would promote or retard his advancement.

The prohibition in paragraph seven against taking part in the "management or affairs of any political party or in any political campaign" is limited to partisan activity. That the term "political party" restricts only partisan political activity has been argued above.

The term "political campaign" is used in the narrow partisan sense as referring to partisan politics. In the science of government matters, political have intimate relation with and to party policy—the partisan policy upon which offices are filled by election. Participation in the formation of this policy and the election thereon is all that is expressly barred by this provision. The purpose of the Merit System law is to insure the employee the right to retain his position on the merit of his work and not because of his political partisanship.

In *Heidtman* v. *City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138, the question was whether city firemen were taking part in "politics" when they circulated parts of an initiative petition seeking enactment of an ordinance to establish the three-platoon system in the fire department. The Ohio Court held that the word "politics" as used in their civil service law meant dealing with political affairs in a party sense, and that circulating parts of the initiative petition did not constitute taking part in politics as that term is used in civil service law. The Court arrived at its conclusion on the premise that since the statute refers to the solicitation of funds for political parties or candidates as well as political organizations, the expression "take part in politics" was intended to cover only politics embraced

in the party sense. The other reason was that prevalent politics had controlled the police and fire departments, and it was to prevent abuses and resulting evils in this field that the civil service law was passed, thus showing an intention to give the term politics the narrower meaning, which is consistent with the objective to be achieved by the civil service law.

Clearly the objective in prohibiting employees from taking part in a "political campaign" is to prevent the evils of partisan politics in state government. The usual, ordinary and generally accepted meaning of the term "political campaign" means party or partisan organization or campaign. Any claim of more must be grounded upon an unjustified ambiguity sought to be engrafted to warrant a desired construction.

The last part of paragraph seven provides "or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." Appellees contend the phrase "except to exercise his right as a citizen privately to express his opinion and to cast his vote" modifies only that phrase immediately preceding it "or shall take part in the management or affairs of any political party or in any political campaign."

A limiting clause in a statute should be restrained to the last antecedent unless the subject matter requires a different construction. *U. S. ex rel. Santarelli* v. *Hughes*, 116 F.2d 613, 616; *Mandell Bros., Inc.* v. *Federal Trade Commission*, 254 F.2d 18, 22, reversed in part 359 U.S. 385; *Buscaglia* v. *Bowie*, 139 F.2d 294, 296-297.

Appellees contend that the prohibition against taking part in the management or affairs of any political party or in any political campaign means any partisan political party or in any partisan political campaign and that the following limiting clause allows a state employee to be involved in the management or affairs of any partisan political party or in any partisan political campaign to the extent of privately expressing his opinion and expressly recognizes the inherent right of every citizen to exercise his right to vote. There certainly would be no limitation upon state employees in publicly stating their opinions on all non-partisan activity or partisan activity not concerned with the management or affairs of a partisan political party or a partisan political campaign.

It is clear that when the Oklahoma Legislature enacted these prohibited political activity provisions in 1959 they were aware of the holding in *Mitchell, supra*, that only partisan political activity prohibitions can be placed on state employees. The provisions of Section 818 have never been utilized to prohibit non-partisan political activity of state employees. To hold that the Legislature was not aware of the holding in *Mitchell* in enacting the provisions of Section 818, which appellants urge includes prohibitions against non-partisan political activity, would go against the presumption that the Legislature does not do a vain and useless thing.

As stated by the Court in *Lambur* v. *Yates*, 148 F.2d 137, 139:

> "All statutes must be given a sensible construction. The sole object of construction is to determine the legislative intent. Such intent must be found primarily

in the language of the statute itself; but when the language is ambiguous or the meaning is doubtful, the court should consider the purpose, the subject matter and the condition of affairs which led to its enactment, and so construe it as to effectuate and not destroy the spirit and force of the law and not to render it absurd."

See *American Tobacco Co.* v. *Wreckmeister*, 207 U.S. 284, 293; *United States* v. *Katz*, 271 U.S. 354, 357; *United States* v. *Cooper Corporation*, 312 U.S 600, 605-606.

III.

APPELLANTS ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

Appellants contend they are denied the equal protection of the law in that they are denied the rights granted to all other citizens without justification for the distinction.

As stated by the Court in *Bagley* v. *Washington Township Hospital Dist.*, 55 Cal.Rptr. 401, 421 P.2d 409, 414:

"The government employee should no more enjoy the right to wrap himself in the flag of constitutional protection against every condition of employment imposed by the government than the government should enjoy an absolute right to strip him of every constitutional protection. Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of public-conferred benefits despite a resulting qualification of constitutional rights."

The right of the State to prohibit the political activities of state employees has long been upheld. The Court in *Mitchell, supra,* explained it thusly at pages 102-103:

> "We have said that Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional."

In *State ex rel. McKittrick* v. *Kirby,* 349 Mo. 988, 163 S.W.2d 990, a provision of a city charter prohibiting the solicitation of political funds by employees in the classified service and prohibiting such employees from taking an active part in political campaigns, serving as officers of political organizations, circulating political petitions, working at polls, and the like, and providing that they may become candidates for public office only after resigning their

employment, was held not to constitute an unlawful interference with the right of freedom of speech as guaranteed by the Federal and State Constitutions, not to deprive the members of the classified service of their property and liberty without due process of law, and not to constitute discrimination in violation of the equal protection clause of the Fourteenth Amendment. The Court took the view that public employment may be conditioned upon reasonable limitation of the privilege of free speech and that a public office is not property in the constitutional sense and there is no inherent right to hold public office, such a right not being comprehended within the words "liberty" and "property" as they are used in the Fourteenth Amendment. The argument that the fact that the statute restricted certain political acivities on the part of members of the classified service without similarly curtailing the political activities of other city officials and employees constituted discrimination in violation of the equal protection clause was also rejected, the Court saying that the equal protection clause does not require exactly equal treatment of all citizens—the Legislature may create certain classes and make laws applicable to some but not all of the classes, provided that the principle of classification rests upon some real difference which bears a reasonable and just relation to the ends sought to be accomplished by the legislation. Examining the purposes and results of the charter provision in issue, the Court found that in general the line between the classified and unclassified civil service coincided with the classification of ministerial and policy-forming officers, and said that policy-forming officers should reflect the popular will and to do so must engage in politics, but that ministerial employees have nothing to do with forming public policy and

are best able to perform their duties when separated from the uncertainties of political influence, which requires that they be forbidden to take a public and prominent part in the activities of political parties and in election campaigns.

The Legislature in Oklahoma created two classes of state employees when the Merit System was created in 1959, classified employees who are under the Merit System and unclassified employees who are not. The classified employees as a class are subject to the prohibitions against partisan political activity as a policy decision of the Legislature. The distinction between the two classes in this regard is based upon the legislative intent to keep the evils of partisan politics out of state government. Inherent in this decision is the prerogative of the Legislature to decide what state employees are most subject to party political activity and what employees need to engage in politics to reflect the will of the citizens of the State. In addition, classified employees enjoy the benefits of the Merit System, while unclassified employees work in an environment dictated solely by the whims and caprices of their employers. Unclassified employees working for partially or fully federal funded agencies are subject to the Federal Hatch Act provisions in regard to their political activity. *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127.

The goal of preventing partisan politics from affecting the integrity and efficiency of state government while allowing the State to be responsive to the desires of its citizens compels the vesting of the Legislature with the authority to decide those state employees who are subject to the prohibitions in Section 818.

IV.
CONTENTIONS OF APPELLANTS

Appellants contend that the political activity provisions of Section 818 are unconstitutionally vague and overbroad. In citing precedent for their position appellants rely on a number of State Supreme Court decisions and lower Federal Court decisions. The Oregon, California and New Jersey decisions of *Fort* v. *Civil Service Commission*, 38 Cal. Rptr. 625, 392 P.2d 385; *Minielly* v. *State of Oregon*, 242 Ore. 470, 411 P.2d 69; *Kinnear* v. *City and County of San Francisco*, 38 Cal. Rtpr. 631, 392 P.2d 391; *Destefano* v. *Wilson*, 96 N.J. Super. 592, 122 A.2d 682; held political activity prohibitions to be invalid for overbreadth reasons. We have previously set forth argument showing that Section 818 political activity prohibitions are narrowly drawn to prohibit partisan political activity.

In *Gray* v. *City of Toledo*, 323 F.Supp. 574, the Court ruled part of the political activity prohibitions invalid as being overbroad, but also upheld those restrictions that were narrowly drawn to prohibit partisan political activity. In so doing the Court examined the language of the prohibitions on a word-by-word basis. While the Court struck down language similar to that of Section 818, there was no showing that there was any authority vested in the agency responsible for enforcing those provisions to promulgate rules or regulations defining the meaning of the political activity prohibitions. Apparently, an individual subject to those provisions had no recourse to other definitive provisions nor was a system set up to provide same. We feel that the decision should be distinguished from the

case at bar for the reason that Section 818 is drawn to prohibit partisan political activity and the Court should look to extrinsic aids in determining the nature of the prohibitions. The facial language of Section 818 together with the rules promulgated by the State Personnel Board, circulars distributed by said Board, and the availability of advisory opinions from the Board adequately inform state employees that the prohibitions are against partisan political activity and what factual situations would fall within the prohibitions.

Both *Hobbs* v. *Thompson*, 448 F.2d 456, and *Mancuso* v. *Taft*, 341 F.Supp. 574, were cited by appellants in support of their contentions. The courts in those two cases also invalidated political activity restriction on the grounds of vagueness and overbreadth. The essence of their decision, though, is found in the body of the opinions. In *Hobbs* the Court discussed *United Public Workers of America* v. *Mitchell*, 330 U.S. 75, and on page 472 stated:

> "This standard of review, with its almost wholesale deference to the legislature's judgment, would make strict overbreadth scrutiny of the Macon scheme impossible. *Mitchell*, in other words, held that a broad prophylactic rule against political activity—which, in the individual case, might proscribe conduct unrelated to a significant state interest—could be upheld so long as the legislature's overall judgment was premised on a rational basis. It is this approach in *Mitchell* which we think is no longer good law."

In *Mancuso* the Court also discussed the *Mitchell* decision and stated on page 581:

> "There comes a point where the vitality of a case, though that case has not been expressly overruled,

may be seen to have been vitiated by the force of subsequent decisions. I believe that point has been reached. In the conflict between adherence to the doctrine of stare decisis and my obligation to apply the Constitution as an organic document evolving with the society it governs, I conclude, after much troubling thought and concern, that the *Mitchell* standard of review, in justice, cannot be applied here."

Embodied in the decisions of the Courts in these two cases is the philosophy that they no longer have to follow this Court's decision in *Mitchell*. We urge that the Court's decision in *Mitchell* is still valid and that the prophylactic approach to prohibiting political activity, however mistated in *Hobbs*, is a valid approach to the problem. The constitutional freedoms of appellants are not proscribed in the approach taken by the State of Oklahoma in limiting their political activity.

The effort of the State in following the decisions in *Mitchell* and *Oklahoma* was the enactment of Section 818. The prohibitions contained therein were established to meet any procedural constitutional problems in following the prophylactic approach of *Mitchell*. Given the alternatives for procedurally establishing partisan political activities, this approach is as constitutionally valid as any other.

CONCLUSION

The District Court properly adhered to all constitutional principles governing prohibitions against state employees' involvement in partisan politics and all issues raised were properly decided. For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee

March, 1973

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing instrument, were served upon:

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all parties required to be served, by mailing such true and correct copies, postage prepaid, this _____ day of _____, 1973.

_____

Mike D. Martin

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In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1639

WILLIAM M. BROADRICK, JIMMY R. URY, and CLIVE R. RIGSBY, for themselves and for the Class, "Classified Employees within the Classified Service of the State of Oklahoma,"

Appellants,

VERSUS

THE STATE OF OKLAHOMA, EX REL., THE OKLAHOMA STATE PERSONNEL BOARD, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REPLY BRIEF FOR APPELLANTS

REPLY TO ARGUMENT I OF THE ANSWER BRIEF CONCERNING THE MODELING OF 74 O.S. 1971, SECTION 818, AFTER THE FEDERAL HATCH ACT

Section 818, enacted in 1959, admits of similarities to the Federal Hatch Act prohibitions, but the pertinent portion of the Oklahoma Merit System of Personnel Administration Act is inherently distinguishable from the pertinent portion of the Federal Hatch Act.

It is respectfully urged that *United Public Workers* v. *Mitchell*, 330 U.S. 75, and *Oklahoma* v. *Civil Service Commission*, 330 U.S. 327, did not determine the meaning and

effect of the prohibitions in the Federal Hatch Act measured against First Amendment Standards' arguments of vagueness and over-breadth.

The intent of the Oklahoma Legislature to enact the Oklahoma Merit System of Personnel Administration was to correct the evils of the spoils system of government while providing basic standards of competency in filling positions of employment in government, an appropriate, desirable and commendable objective. However, such enactment was not without proscribing certain otherwise lawful conduct of State employees. It is this proscription which is before the Court.

Unnumbered paragraphs six and seven of 74 O.S. 1971, Section 818, are as follows:

> "No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.
>
> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his veto."

The Oklahoma Statute admittedly restricts State employees' First Amendment rights, but such restrictions are not couched in comprehensible language with reasonably ascertainable standards, nor are such restrictions only imposed as are necessary to protect identifiable and overriding governmental interests.

The State of Oklahoma by statute has cast a pall over the political activities of certain of its employees rendering them politically impotent in derogation of their rights under the First Amendment.

REPLY TO ARGUMENT II OF THE ANSWER BRIEF THAT PARAGRAPHS SIX AND SEVEN OF 74 O.S. 1971, SECTION 818, ARE NOT UNCONSTITUTIONALLY VAGUE AND OVER-BROAD

The prohibitions set forth in paragraphs six and seven of 74 O.S. 1971, Section 818, *supra*, are worded in generalities that lack precision. There is no standard. One cannot read these paragraphs and ascertain what activities, if any, are permitted and what activities are proscribed.

The appellees suggest that the problem of the Oklahoma statute is one of definition of the words "political" and "politics." Then through tortuosity of legal reasoning, appellees contend that such words connote partisanism. We respectfully disagree with such a conclusion.

In enacting 74 O.S. 1971, Section 818, the Legislature expressly utilized the words "partisan political" in unnumbered paragraph seven. However, this same Legislature purposefully omitted the limiting word "partisan" to modify or explain the word "political" in other parts of paragraphs

six and seven. It is respectfully submitted that the doctrine of *expressio unius est exclusio alterius* negate the contention of definition and meaning suggested by appellees.

If, however, the appellees are correct in their allegations of the definition of the term "political," does not the Oklahoma Statute broadly prohibit State employees from:

(1) Freely and publicly expressing opinions regarding any political party or any political campaign?

(2) Taking part in any political campaign?

(3) Taking part in the management or affairs of any political party?

(4) Being a candidate for nomination or election to any paid political office?

(5) Being an officer or member of a committee of a partisan political club?

(6) Being a member of any national, state or local committee of a political party?

(7) Being concerned in any manner in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose?

The Oklahoma Statute, paragraphs six and seven, 74 O.S. 1971, Section 818, *supra*, goes far beyond the provisions of the Hatch Act set forth in the *Mitchell* case, *supra*. The innocuous activity of displaying a partisan political button, badge, auto bumper sticker and the like is considered by the Oklahoma State Personnel Board as a violation of the Statute (App. 29) even though this activity

is more akin to a personal expression of political opinion. In what instances and under what set of circumstances would the proscription of the wearing of a partisan political button, badge or displaying an automobile bumper sticker be connected with a valid State interest to merit constitutional approval. It is respectfully submitted that such connection is tenuous.

Where the activities of a public employee are unrelated to the performance of his duties, such an employee is to be treated for purposes of adjudicating his First Amendment rights as a member of the general public. See *Pickering* v. *Board of Education*, 391 U.S. 563. If these are permissible areas of activity, the overriding governmental interest must be marked with utmost clarity. See *Grayned* v. *City of Rockford*, 408 U.S. 104. If it is necessary to impose broad, prophylactic restrictions on First Amendment rights for the purpose of remedying abuses of coercion, intimidation and misuse of official authority, should not the State demonstrate that a less restrictive ban limited to prohibiting the abuses would not suffice to remedy them?

As pointed out in appellants' Brief, numerous governmental statutes and ordinances with political activity prohibition sections have been tested by the courts and have been found wanting in constitutional acceptability because of vagueness and over-breadth. *Fort* v. *Civil Service Commission*, 38 Cal.Rptr. 625, 392 P.2d 385; *Hobbs* v. *Thompson*, 448 F.2d 456 (5th Cir., 1971); *DeStefano* v. *Wilson*, 96 N.J. Super. 592, 122 A.2d 682; *Gray* v. *City of Toledo*, 323 F.Supp. 1281; *Minielly* v. *State of Oregon*, 242 Ore. 490, 411 P.2d 69; *Mancuso* v. *Taft*, 341 F.Supp. 574. It is respectfully submitted that 74 O.S. 1971, Section 818, is not ma-

terially distinguishable from the statutes and ordinances failing the test of vagueness and over-breadth.

REPLY TO ARGUMENT III OF THE ANSWER BRIEF THAT APPELLANTS ARE NOT DENIED THE EQUAL PROTECTION OF THE LAWS

Appellees indicate that employment by the State may be conditioned upon a reasonable limitation of the privilege of free speech. Appellants contend that the proscriptions imposed by Section 818, *supra*, are constitutionally unacceptable because of vagueness and over-breadth. Therefore, it is appellants' contention that employment by the State may not be conditioned upon the acceptance of the unconstitutional proscriptions contained in Section 818, *supra*.

Section 818, *supra*, facially denies the equal protection of the laws to the class of citizens affected by the Statute and in so doing violates the rights of such citizens under the XIV Amendment.

FURTHER REPLY TO ANSWER BRIEF

Appellees inferentially urge that the heart of the Oklahoma Merit System of Personnel Administration would be excised if the contentions of the appellants are sustained. This is factually inaccurate.

Unnumbered paragraphs one through five and eight of Section 818, as follows, would still be effective:

"§818. Discrimination and other prohibited acts.

"No person in the classified service shall be appointed to, or demoted or dismissed from, any posi-

tion in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

"No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

"No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

"No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose or effecting the rights or prospects of any person with respect to employment in the classified service.

"No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

* * * * * * *

"Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply."

It is patently clear that a vast number of protections would still be afforded to the employees of the State of Oklahoma under the remaining provisions of Section 818, *supra*.

Appellants are seeking the right to enjoy the warm breezes of First Amendment privileges while protecting themselves from the strong chilling wind of proscription bottomed in the morass of vagueness and over-breadth.

CONCLUSION

In conclusion, appellants respectfully submit that the pertinent portion of the Oklahoma Merit System of Personnel Administration Act is inherently distinguishable from the pertinent portion of the Hatch Act and to the extent it is distinguishable, said Act is sufficiently overbroad and sufficiently vague and the classification sufficiently arbitrary that the same are wanting in constitutional acceptance under the First, Fifth and Fourteenth Amendments of the United States Constitution. Additionally, appellants submit that *Mitchell, supra,* fails to enunciate the current law as said case applies to the First, Fifth and Fourteenth Amendment rights of the plaintiffs in the case at bar.

WHEREFORE, appellants ask this Court to reverse the judgment of the trial court with instructions to enter an order enjoining the appellees from proceeding further in the dismissal actions against the named appellants.

Respectfully submitted,

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March, 1973

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This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

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Jack Swidensky, General Counsel,
and
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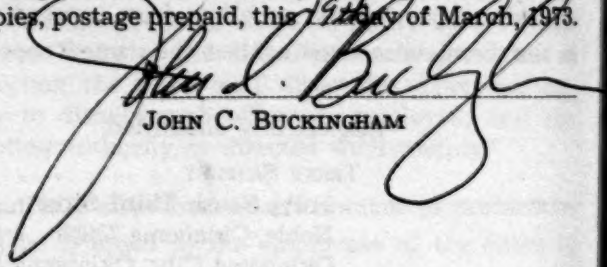
all parties required to be served, by mailing such true and correct copies, postage prepaid, this 19th day of March, 1973.



JOHN C. BUCKINGHAM

SUPREME COURT OF THE UNITED STATES

Syllabus

BROADRICK ET AL. *v.* OKLAHOMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 71–1639. Argued March 26, 1973—Decided June 25, 1973

Appellants, state employees charged by the Oklahoma State Personnel Board with actively engaging in partisan political activities (including the solicitation of money) among their coworkers for the benefit of their superior, in alleged violation of § 818 of the state merit system Act, brought this suit challenging the Act's validity on the grounds that two of its paragraphs are invalid because of overbreadth and vagueness. One paragraph provides that no classified service employee "shall directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." The other provides that no such employee shall belong to "any national, state or local committee of a political party" or be an officer or member of a committee or a partisan political club, or a candidate for any paid public office, or take part in the management or affairs of any political party or campaign "except to exercise his right as a citizen privately to express his opinion and . . . vote." The District Court upheld the provisions. *Held:* Section 818 of the Oklahoma statute is not unconstitutional on its face. *CSC* v. *Letter Carriers, ante,* p. —. Pp. 6–16.

(a) The statute, which gives adequate warning of what activities it proscribes and sets forth explicit standards for those who must apply it, is not impermissibly vague. Pp. 6–7.

(b) Although appellants contend that the statute reaches activities that are constitutionally protected as well as those that are not, it is clearly constitutional as applied to the conduct with which they are charged and because it is not substantially overbroad they cannot challenge the statute on the ground that it might be applied unconstitutionally to others, in situations not before the

Syllabus

Court. Appellants' conduct falls squarely within the proscriptions of § 818, which deals with activities that the State has ample power to regulate, *United Public Workers* v. *Mitchell*, 330 U. S. 75; *CSC* v. *Letter Carriers*, *supra*, and the operation of the statute has been administratively confined to clearly partisan political activity. Pp. 8–16.

338 F. Supp. 711, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion. BRENNAN, J., filed a dissenting opinion in which STEWART and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 71–1639

William M. Broadrick et al., Appellants, *v.* State of Oklahoma et al.	On Appeal from the United States District Court for the Western District of Oklahoma.

[June 25, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 818 of Oklahoma's Merit System of Personnel Administration Act, Okla. Stat. Ann., Tit. 74, § 801 *et seq.*, restricts the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees. Three employees of the Oklahoma Corporation Commission who are subject to the proscriptions of § 818 seek to have two of its paragraphs declared unconstitutional on their face and enjoined because of asserted vagueness and overbreadth. After a hearing, the District Court upheld the provisions and denied relief. 338 F. Supp. 711. We noted probable jurisdiction of the appeal, 409 U. S. 1058, so that appellants' claims could be considered together with those of their federal counterparts in *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL–CIO, ante*, p. —. We affirm the judgment of the District Court.

Section 818 was enacted in 1959 when the State first established its Merit System of Personnel Administration.[1] The section serves roughly the same function as

[1] The section reads as follows:

"[1] No person in the classified service shall be appointed to, or demoted or dismissed from any position in the classified service, or

the analogous provisions of the other 49 States,[2] and is patterned on § 9 (a) of the Hatch Act.[3] Without question, a broad range of political activities and con-

in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

"[2] No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

"[3] No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

"[4] No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibilty, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting the rights or prospects of any person with respect to employment in the classified service.

"[5] No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

"[6] No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee

[*Footnote 2 begins on p. 3; Footnote 3 is on p. 4*]

duct are proscribed by the section. Paragraph six, one of the contested portions, provides that "[n]o employee in the classified service . . . shall, directly or indirectly,

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in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"[7] No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his rights as a citizen privately to express his opinion and to cast his vote.

"[8] Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Presonnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply." Okla. Stat. Ann., Tit. 74, § 818 (1965) (paragraph enumeration added).

[2] See Ala. Code, Tit. 55, § 317 (1958); Alaska Stat. § 39.25.160 (1962); Ariz. Rev. Stat. Ann. § 16–1301 (1956), Merit System Regulations and Merit System Bd. Procedures § 1511 (1966); Ark. Stat. Ann. § 83–119 (1947); Cal. Gov't Code §§ 19730–19735 (West 1964); Colo. Rev. Stat. Ann. § 26–5–31 (1963), Civil Service Comm'n Rules and Regulations, Art. XIV, § 1; Conn. Gen. Stat. Ann. § 5–266 (1958), Regulations of the Civil Service Comm'n Concerning Employees in the State Classified Service § 14–13; Del. Code Ann., Tit. 31, § 110 (1953); Fla. Stat. Ann. § 110.092 (1973); Ga. Merit System of Personnel Administration, Rules and Regulations, Rule 3, ¶ 3.101–3.106; Hawaii Rev. Stat. § 76–1, 76–91 (1968); Idaho Code § 67–5311 (1973); Ill. Ann. Stat., c. 24½, § 38t (Smith-

solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." Paragraph seven, the other challenged paragraph, provides that no such employee "shall be a member of any national, state or local committee of a political party, or an officer or member of a committee or a partisan political club, or a candidate for nomination or election to any paid public office." That paragraph further

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Hurd 1969); Ind. Ann. Stat. § 60–B41 (1970); Iowa Code Ann. § 19A.18 (1967); Kan. Stat. Ann. § 75–2953 (1969); Ky. Rev. Stat. Ann. § 18.310 (1969); La. Civ. Code Ann., Art. 14, § 15 (N) (West 1951); Me. Rev. Stat. Ann., Tit. 5, § 679 (1964); Md. Merit System Rules for Grant-in-Aid Agencies § 602.2; Mass. Gen. Laws Ann. c. 55, §§ 1–15, c. 56, §§ 35–36 (1958); Mich. Rules of Civil Service Comm'n § 7 (1965); Minn. Stat. Ann. § 43.28 (1970); Miss. Merit System Rules, Dept. of Public Welfare, Art. XVI (1965); Mo. Ann. Stat. § 36.150 (1969); Mont. Rev. Codes Ann. §§ 94–1439, 94–1440, 94–1447, 94–1476 (1942); Neb. Rev. Stat. § 81–1315 (1968), Neb. Joint Merit System Reg. for a Merit System, Art. XVI (1963); Nev. Rules for State Personnel Administration, Rules XVI, XIII (1963); N. H. Rev. Stat. Ann. §§ 98:18–98:19 (1968); N. J. Stat. Ann. § 11:17–2 (1960); N. M. Stat. Ann. § 5–4–42 (1953); N. Y. Civ. Serv. Law § 107 (1973); N. C. Gen. Stat. §§ 126–13–126–15 (1964); Rules and Reg. of N. D. Merit Systems, Art. XVI; Ohio Rev. Code Ann. §§ 143.41, 143.44, 143.45, 143.46 (p. 1954); Ore. Rev. Stat. § 260.432 (1953); Pa. Stat. Ann., Tit. 71, § 741.904 (1962); R. I. Gen. Laws Ann. §§ 36–4–51—36–4–53 (1969); S. C. Merit System Rules and Reg., Civil Defense Council, Art. XIV, § 1; S. D. Merit System Reg., Art. XVI (1963), § 1; Tenn. Code Ann. § 8–3121 (1955), Tenn. Rules and Reg. for Administering the Civil Service Act § 2.3 (1963); Tex. Penal Code Ann., Art. 195–197 (1953); Utah Code Ann. § 67–13–13 (1953); Vt. Rules and Reg. for Personnel Administration § 3.02; Va. Supp. to Rules for the Administration of the Va. Personnel Act Rule 15.14 (A); Wash. Rev. Code Ann. § 41–06–250 (1968); W. Va. Code Ann. § 29–6–19 (1971); Wis. Stat. Ann. § 16.30; Wyo. Rev. Rules and Regs. Rule XIII (1960).

[5] 5 U. S. C. § 7324 (a). See generally *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL–CIO*, *ante*, p. —.

prohibits such employees from "tak[ing] part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." As a complementary proscription (not challenged in this lawsuit) the first paragraph prohibits any person from "in any way" being "favored or discriminated against with respect to employment in the classified service because of his political . . . opinions or affiliations." Responsibility for maintaining and enforcing § 818's proscriptions is vested in the State Personnel Board and the State Personnel Director, who is appointed by the Board. Violation of § 818 results in dismissal from employment and possible criminal sanctions and limited state employment ineligibility. Okla. Stat. Ann., Tit. 74, §§ 818 and 819.

Appellants do not and have not questioned Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees. Appellants freely concede that such restrictions serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from "political extortion."[4] See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 99–103 (1947). Rather, appellants maintain that however permissible, even commendable, the goals of § 818 may be, its language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be proscribed and conduct that must be permitted. For these and other reasons,[5] appellants assert that the sixth and

[4] Brief for Appellants 22.

[5] Appellants also claim that § 818 violates the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leav-

seventh paragraphs of § 818 are void *in toto* and cannot be enforced against them or anyone else.*

We have held today that the Hatch Act is not impermissibly vague. *CSC* v. *Letter Carriers, ante*, p. —. We have little doubt that § 818 is similarly not so vague that "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). See *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–114 (1972); *Colton* v. *Kentucky*, 407 U. S. 104, 110–111 (1972); *Cameron* v. *Mitchell*, 390 U. S. 611, 616 (1968). Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warnings of what activities it proscribes or fails to set out "explicit standards" for those who must apply it. *Grayned* v. *City of Rockford, supra*, at 108. In the plainest language, it prohibits any state classified employee from being "an officer or member" of a "partisan political club" or a candidate for "any paid public office." It forbids the solicitation of contributions "for any political organization, candidacy or other political purpose" and the taking part "in the management or affairs of any political party or in any political campaign." Words inevitably contain germs of uncertainty and, as with the Hatch Act,

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ing unclassified personnel free from such restrictions. The contention is somewhat odd in the context of appellants' principal claim, which is that § 818 reaches too far rather than not far enough. In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. See *McGowan* v. *Maryland*, 366 U. S. 420 (1961). And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

* Only the sixth and seventh paragraphs of § 818 are at issue in this lawsuit. Hereinafter, references to § 818 should be understood to be limited to those paragraphs, unless we indicate to the contrary.

there may be disputes over the meaning of such terms in § 818 as "partisan," or "take part in," or "affairs of" political parties. But what was said in *Letter Carriers*, *ante*, p. —, is applicable here: "there are limitations in the English language with respect to being both specific and managably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." [7] Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions and appellants concede as much.[8] See *Dombrowski* v. *Pfister*, 380 U. S. 479, 491–492 (1965); *United States* v. *National Dairy Products Corp.*, 372 U. S. 29 (1963); *Williams* v. *United States*, 341 U. S. 87 (1951); *Robinson* v. *United States*, 324 U. S. 282, 286 (1945); *United States* v. *Wurzbach*, 280 U. S. 396 (1930).

Shortly before appellants commenced their action in the District Court, they were charged by the State Personnel Board with patent violations of § 818.[9] Accord-

[7] It is significant in this respect to note that § 818 does not create a "regulatory maze" where those uncertain may become hopelessly lost. See *Keyishian* v. *Board of Regents*, 385 U. S. 589, 604 (1967). Rather, the State Personnel Board is available to rule in advance on the permissibility of particular conduct under the explicit standards set out in and under § 818. See Rec. 237. See *CSC* v. *Letter Carriers*, *ante*, at —.

[8] Tr. of Oral Arg., 48–49.

[9] The District Court initially requested the parties to brief the question whether appellants were required to complete the Board's proceedings prior to bringing their action under 42 U. S. C. § 1983. The Board, however, on appellants' application, ordered its proceedings stayed pending adjudication of the federal constitutional questions in the District Court. When advised of the Board's decision,

ing to the Board's charges, appellants actively participated in the 1970 re-election campaign of a Corporation Commissioner, appellants' superior. All three allegedly asked other Corporation Commission employees (individually and in groups) to do campaign work or to give referrals to persons who might help in the compaign. Most of these requests were made at district offices of the Commission's Oil and Gas Conservation Division. Two of the appellants were charged with soliciting money for the campaign from Commission employees and one was also charged with receiving and distributing campaign posters in bulk. In the context of this type of obviously covered conduct, the statement of Mr. Justice Holmes is particularly appropriate: "if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns." *United States* v. *Wurzbach*, *supra*, 280 U. S., at 399.

Appellants assert that § 818 has been construed as applying to such allegedly protected political expression as the wearing of political buttons or the displaying of bumper stickers.[10] But appellants did not engage in any such activity. They are charged with actively engaging in partisan political activities—including the solicitation of money—among their co-workers for the benefit of their superior. Appellants concede—and correctly so, see *Letter Carriers*, *ante*—that § 818 would be constitutional as applied to this type of conduct.[11] They

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and in the absence of any objections from appellees, the District Court proceeded. On this record, we need not consider whether appellants would have been required to proceed to hearing before the Board prior to pursuing their § 1983 action. Cf. *Gibson* v. *Berryhill*, 411 U. S. —, — (1973) (slip op., p. 10); Hart and Wechsler, The Federal Courts and The Federal System, 983–985 (2d ed. 1973).

[10] The State Personnel Board has so interpreted § 818. See Merit System of Personnel Administration Rules § 1641; the Board's official circular, Rec. 237.

[11] Tr. of Oral Arg., 48–49.

nevertheless maintain that the statute is overbroad and purports to reach protected, as well as unprotected conduct, and must therefore be stricken down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, *e. g.*, *Austin* v. *The Aldermen*, 7 Wall. 694, 698–699 (1868); *Supervisors* v. *Stanley*, 105 U. S. 305, 311–315 (1881); *Hatch* v. *Reardon*, 204 U. S. 152, 160–161 (1907); *Yazoo & Miss. Valley R.* v. *Jackson Vingear Co.*, 226 U. S. 217, 219–220 (1912); *United States* v. *Wurzbach*, 280 U. S. 396, 399 (1930); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *United States* v. *Raines*, 362 U. S. 17 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris*, 401 U. S. 37, 52 (1971). Constitutional judgments, as Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding

the constitution; or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

In the past, the Court has recognized some limited exceptions to these principles, but only because of the most "weighty countervailing policies." *United States* v. *Raines*, *supra*, 362 U. S., at 22–23.[12] One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 444–446 (1972); *NAACP* v. *Alabama*, 357 U. S. 449 (1958). Another exception has been carved out in the area of the First Amendment.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exericse of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. *Herndon* v. *Lowry*, 301 U. S. 253, 258 (1937); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960); *Grayned* v. *City of Rockford*, *supra*, 408 U. S., at 116–117. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite specificity." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965). Litigants, therefore, are permitted

[12] See generally, Hart and Wechsler, *supra*, at 184–214; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972). See *Cohen* v. *California*, 403 U. S. 15 (1971); *Street* v. *New York*, 394 U. S. 576 (1969); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *United States* v. *Robel*, 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Shelton* v. *Tucker*, *supra*. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place and manner of expressive or communicative conduct, see *Grayned* v. *City of Rockford*, 408 U. S. 104, 114–121 (1972); *Cameron* v. *Johnson*, 390 U. S. 611, 617–619 (1968); *Zwickler* v. *Koota*, 389 U. S. 241, 249–250 (1967); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amend-

ment rights. See *Shuttlesworth* v. *Birmingham*, 394 U. S. 147 (1969); *Cox* v. *Louisiana*, 379 U. S. 536, 553–558 (1965); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See *Dombrowski* v. *Pfister*, *supra*, 380 U. S., at 491; *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971); cf. *Breard* v. *Alexandria*, 341 U. S. 622 (1951). Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct. In *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), Jesse Cantwell, a Jehovah's Witness, was convicted of common law breach of the peace for playing a phonograph record attacking the Catholic Church before two Catholic men on a New Haven street. The Court reversed Cantwell's conviction, but only on the ground that his conduct, "considered in light of the constitutional guarantees," could not be punished under "the common law offense in question." *Id.*, at 311 (footnote omitted). The Court did not hold that the offense "known as breach of the peace" must fall *in toto* because it was capable of some unconstitutional applications, and, in fact, the Court seemingly envisioned its continued use against "a great variety of

conduct destroying or menacing public order and tranquility." *Id.*, at 308. See *Garner* v. *Louisiana*, 368 U. S. 157, 202–203, 205 (1961) (Harlan, J., concurring). Similarly, in reviewing the statutory breach of the peace convictions involved in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), and *Cox* v. *Louisiana*, 379 U. S. 536, 544–552 (1965), the Court considered in detail the State's evidence and in each case concluded that the conduct at issue could not itself be punished under a breach of the peace statute. On that basis, the convictions were reversed.[13] See also *International Brotherhood of Teamsters, Local 695* v. *Vogt*, 354 U. S. 284 (1957). Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. See *United States* v. *Harriss*, 347 U. S. 612 (1954); *United States* v. *CIO*, 335 U. S. 106 (1948); cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *Pickering* v. *Board of Education*, 391 U. S. 563, 565 n. 1 (1968); *Eastern R. Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. (1961).

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. *Coates* v. *Cincinnati*, 402 U. S. 611 (1972) (separate opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication

[13] In both *Edwards* and *Cox I*, at the very end of the discussions, the Court also noted that the statutes would be facially unconstitutional for overbreadth. See 372 U. S., at 238; 379 U. S., at 551–552. In *Cox I*, the Court termed this discussion an "additional reason" for its reversal. 379 U. S., at 552. These "additional" holdings were unnecessary to the dispositions of the cases, so much so that only one Member of this Court relied on *Cox's* "additional" holding in *Brown* v. *Louisiana*, 383 U. S. 131 (1966), which involved convictions under the very same breach of the peace statute. See *id.*, at 143–150 (BRENNAN, J., concurring).

is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.[14]

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[14] My Brother BRENNAN asserts that in some sense a requirement of substantial overbreadth is already implicit in the doctrine. *Post*, p. 10. This is a welcome observation. It perhaps reduces our differences to our differing views of whether the Oklahoma statute is substantially overbroad. The dissent also insists that *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971), must be taken as overruled. But we are unpersuaded that *Coates* stands as a barrier to a rule that would invalidate statutes for overbreadth only when the flaw is a substantial concern in the context of the statute as a whole. Our judgment is that the Oklahoma statute, when authoritative administrative constructions are accepted, is not invalid under such a rule.

Unlike ordinary breach of the peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments. But at the same time, § 818 is not a censorial statute, directed at particular groups or view points. Cf. *Keyshian* v. *Board of Regents, supra.* The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass. This much was established in *United Public Workers* v. *Mitchell,* and has been unhesitatingly reaffirmed today in *Letter Carriers, ante.* Under the decision in *Letter Carriers,* there is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates to any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters at the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

These proscriptions are taken directly from the contested paragraphs of § 818, the Rules of the State Person-

nel Board and its interpretive circular, and the authoritative opinions of the State Attorney General. Without question, the conduct appellants have been charged with falls squarely within these proscriptions.

Appellants assert that § 818 goes much farther than these prohibitions. According to appellants, the statute's prohibitions are not tied tightly enough to *partisan* political conduct and impermissibly relegate employees to expressing their political views "privately." The State Personnel Board, however, has construed § 818's explicit approval of "private" political expression to include virtually any expression not within the context of active partisan political campaigning,[15] and the State's Attorney General, in plain terms, has interpreted § 818 as prohibiting "clearly partisan political activity" only.[16] Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 162–163 (1971). Appellants further point to the Board's interpretive rules purporting to restrict such allegedly protected activities as the wearing of political buttons or the use of bumper stickers. It may be that such restrictions are impermissible and that the § 818

[15] The Board's interpretive circular states (Rec. 237):

"The right to express political opinions is reserved to all such persons. Note: This reservation is subject to the prohibition that such persons may not take active part in political management or in political campaigns."

[16] Opinion of the Attorney General, No. 68–356, p. 2 (1968). The District Court similarly interpreted § 818 as intending to permit public expressions of political opinion "so long as the employee does not channel his activity towards party success." 338 F. Supp. 711, 716. Although the Court's interpretation is obviously not binding on state authorities, see *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363, 369 (1971), a federal court must determine what a state statute means before it can judge its facial constitutionality.

may be susceptible of some other improper applications. But as presently construed, we do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face.

The judgment of the District Court is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 71–1639

William M. Broadrick et al., Appellants, *v.* State of Oklahoma et al.	On Appeal from the United States District Court for the Western District of Oklahoma.

[June 25, 1973]

MR. JUSTICE DOUGLAS, dissenting.

This case in my view should be governed by some of the considerations I set forth in my dissent in the *Letter Carriers* case, *ante* —.

Section 18 (7) of the Oklahoma Act states

> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee *of a partisan political club*, or a candidate for nomination or election to any paid public office, or *shall take part in the management or affairs* of any political party *or in any political campaign*, except to exercise his rights as a citizen privately to express his opinion and to cast his vote." (Emphasis supplied.)

If this were a regulation of business or commercial matters the Court's citation of *Connally* v. *General Construction Co.*, 385, 391, would be apt. *Connally* was a case involving a state law making it a crime for contractors with the State to pay their workmen less than the "current rate of per diem wages in the locality where the work is performed." The Court held the Act too vague to pass muster as a penal measure. I would concede that by the *Connally* test § 18 (7) would not fall.

For the provision in question bars an employee from taking "part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

But the problem here concerns not commerce but the First Amendment. The First Amendment goes further than protecting a person for "privately" expressing his opinion. Public as well as private discourse is included; and the emphasis in § 18 (7) that *private* expression of views is tolerated emphasizes that public expression is not tolerated.

I do not see how Government can deprive its employees of the right to speak, write, assemble, or petition once the office is closed and the employee is home on his own. Public discussion of local, state, national, and international affairs is grist for the First Amendment mill. Our decisions emphasize that free debate, uninhibited discussion, robust and wide-open controversy, a multitude of tongues, the pressure of ideas clear across the spectrum set the pattern of First Amendment freedoms. We emphasized in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, that neither injury "to official reputation" nor "factual error" justified repression of speech, that the demands of free speech lowered the barriers to libel actions for charges of official misconduct or improprieties.

First Amendment rights are indeed fundamental, for "we the people" are the sovereigns, not those who sit in the seats of the mighty. It is the voice of the people who ultimately have the say; once we fence off a group, and bar them from public dialogue, the public interest is the loser. Those who are tied into the federal regime either by direct employment or by state projects federally financed now amount to about five and a half million.

The number included, if all state employees are added, is estimated* at over 13 million.

These people are scrubwomen, janitors, typists, file clerks, chauffeurs, messengers, nurses, orderlies, policemen and women, night watchmen, telephone and elevator operators, as well as those doing some kind of administrative, executive, or judicial work. There are activities that do not touch on First Amendment rights which can be banned. There are illegal election procedures such as wiretapping, burglary, and mailing politically salacious letters that are beyond the pale. The First Amendment, however, concerns a variety of activities that are deep in our tradition: forming *ad hoc* committees to lobby measures through a council or other legislative body; organizing protective associations to protect lakes, river, islands of wilderness, or a neighborhood; preparing and circulating petitions for signatures in support of legislative reforms; making protest marches or picketing the statehouse for a public cause—these as well as debate, passing out campaign literature, watching at the polls, making radio and TV appearances, addressing rallies in parks or auditoriums, are all part of the intense process of mobilizing "we the people" for or against specific measures, shaping public opinion, getting X rather than Y elected, and so on.

A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes them alert, vigilant, and alive. It is suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice. High values ride on today's decision in this case and in *Letter Carriers*. I would not allow the bureaucracy in

*Statistical Abstract of the United States 1972, pp. 403, 431.

the State or Federal Government to be deprived of First Amendment rights. Their exercise certainly is as important in the public sector as it is in the private sector. Those who work for Government have no watered-down constitutional rights. So far as the First Amendment goes, I would keep them on the same plane with all other people.

I would reverse the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 71-1639

William M. Broadrick et al., Appellants, v. State of Oklahoma et al.	On Appeal from the United States District Court for the Western District of Oklahoma.

[June 25, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Whatever one's view of the desirability or constitutionality of legislative efforts to restrict the political activities of government employees, one must regard today's decision upholding § 818 of the Oklahoma Merit System of Personnel Administration Act [1] as a wholly unjustified retreat from fundamental and previously well-established First and Fourteenth Amendment principles. For the purposes of this decision, the Court assumes—perhaps even concedes—that the statute at issue here sweeps too broadly, barring speech and conduct that are

[1] Okla. Stat. Ann. § 818 provides in pertinent part:

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

constitutionally protected even under the standards announced in *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947), and reiterated today in *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL–CIO*, *ante*, p. —. Nevertheless, the Court rejects appellants' contention that the statute is unconstitutional on its face, reasoning that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Ante*, at 14. That conclusion finds no support in previous decisions of this Court, and it effectively overrules our decision just two Terms ago in *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971). I remain convinced that *Coates* was correctly decided, and I must therefore respectfully dissent.

As employees of the Corporation Commission of the State of Oklahoma, a state agency, appellants are subject to the provisions of the State's Merit Act. That Act designates certain state agencies, including the Corporation Commission, which are barred from dismissing or suspending classified employees for political reasons. At the same time, the Act authorizes the State Personnel Board to dismiss or suspend any classified employee who engages in certain prohibited political activity. Although specifically protecting an employee's right "as a citizen privately to express his opinion and to cast his vote," the Act bars (1) fund-raising for any political purpose; (2) membership in any national, state, or local committee of a political party or a political club; (3) candidacy for any public office; and (4) participation in the "management or affairs of any political party or in any political campaign."

As a result of appellants' alleged particiaption in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones, the State Personnel Board formally charged appellants with violations of the Act. Appellants then brought this action under 42 U. S. C. § 1983 before a three-judge Federal District Court in the Western District of Oklahoma, seeking an injunction against enforcement of the Act. The District Court rejected appellants' contentions that the Act is unconstitutionally vague and overbroad, and the Court today affirms that determination.

Appellants' claims are, of course, similar to the vagueness and overbreadth contentions rejected by the Court today in upholding § 9 (a) of the Hatch Act, 5 U. S. C. § 7324 (a)(2). See *National Association of Letter Carriers, ante*, p. ——. But that decision, whether or not correct, is by no means controlling on the questions now before us. Certain fundamental differences between the Hatch Act and the Oklahoma Merit Act should, at the outset, be made clear.

Section 9 (a) of the Hatch Act provides that a Federal Government employee may not "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or (2) take an active part in political management or in political campaigns." Although recognizing that the meaning of the Act's critical phrase, "an active part in political management or in political campaigns," is hardly free from ambiguity, the Court concluded that the terms could be defined by reference to a complex network of Civil Service Commission regulations developed over many years and comprehensively restated in 1970. See 5 CFR Part 733. Those regulations make clear that among the rights retained by a federal employee, notwithstanding the arguably contrary language of the statute, are the rights to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates"; to "[d]is-

play a political picture, sticker, badge, or button"; to "[b]e a member of a political party or other political organization . . . ."; and to "[m]ake a financial contribution to a political party or organization." 5 CFR § 733.111.

By contrast, the critical phrase of the Oklahoma Act—no employee shall "take part in the management or affairs of any political party or in any political campaign"—is left almost wholly undefined. While the Act does specifically declare that employees have the right to express their views "privately," it nowhere defines the terms "take part" or "management" or "affairs." The reservation of the right to express one's views in private could, moreover, be thought to mean that any public expression of views is forbidden. Of course, the Oklahoma Act can, like its federal counterpart, be viewed in conjunction with the applicable administrative regulations. But in marked contrast with the elaborate set of regulations purporting to define the prohibitions of the Hatch Act, the pertinent regulations of the State Personnel Board are a scant five rules that shed no light at all on the intended reach of the statute. Two of those rules merely recite the language of the Act.[2]

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[2] Oklahoma State Personnel Board Rule 1630 (1971):

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service."

Rule 1640 provides:

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club or a candidate

A third offers no more specific guidance than the general exhortation that a classified employee shall "pursue the common good, and, not only be impartial, but so act as neither to endanger his impartiality nor to give occasion for distrust of his impartiality." [3] A fourth provides

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for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Compare n. 1, *supra*.

[3] Rule 1625 provides:

"Every classified employee shall fulfill to the best of his ability the duties of the office of position conferred upon him and shall prove himself in his behavior, inside and outside, the worth of the esteem which his office or position requires. In his official activities the classified employee shall pursue the common good, and, not only be impartial, but so act as neither to endanger his impartiality nor to give occasion for distrust of his impartiality.

"A classified employee shall not engage in any employment, activity or enterprise which has been determined to be inconsistent, incompatible, or in conflict with his duties as a classified employee or with the duties, functions or responsibilities of the Appointing Authority by which he is employed.

"Each Appointing Authority shall determine and prescribe those activities which, for employees under its jurisdiction, will be considered inconsistent, incompatible or in conflict with their duties as classified employees. In making this determination the Appointing Authority shall give consideration to employment, activity or enterprise which: (a) involves the use for private gain or advantage of state time, facilities, equipment and supplies; or, the badge, uniform, prestige or influence of one's state office of employment, or (b) involves receipt or acceptance by the classified employee of any money or other consideration from anyone, other than the State, for the performance of any act which the classified employee would be required or expected to render in the regular course or hours of his state employment or as a part of his duties as a state classified employee, or (c) involves the performance of an act in other than his capacity as a state classified employee which act may later be subject directly or indirectly to the control, inspection, review, audit

that a classified employee must resign his position "prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a political party"—again, merely tracking the language of the Act.[4] The fifth, far from clarifying or limiting the scope of the Act, provides the major thrust to appellants' overbreadth contention. The rule declares that "[a]n employee in the classified service may not wear a political badge, button, or similar partisan emblem, nor may such employee display a partisan political sticker or sign on an automobile operated by him or under his control."[5] Even the Court concedes that a ban on the wearing of buttons or the display of bumper stickers may be "impermisible." *Ante*, at 16.

It is possible, of course, that the inherent ambiguity of the Oklahoma statute might be cured by judicial construction of its terms. But the Oklahoma Supreme Court has never attempted to construe the Act or narrow its

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or enforcement by such classified employee or the agency by which he is employed.

"Each classified employee shall during his hours of duty and subject to such other laws, rules and regulations as pertain thereto, devote his full time, attention and efforts to his office or employment."

[4] Rule 1209.2 provides:

"Any classified employee shall resign his position prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a political party, partisan political club or organization or serving as a member of a committee of any such group or organization."

[5] Rule 1641 provides:

"An employee in the classified service may not wear a political badge, button, or similar partistan emblem, nor may such employee display a partisan political sticker or sign on an automobile operated by him or under his control. Continued use or display of such political material shall be deemed willful intent to violate the provisions of 74 O. S. 1961 § 818 relating to prohibited political activities of classified State employees and shall subject such employee to dismissal pursuant to said statute."

apparent reach. Plainly, this Court cannot undertake that task. *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972); *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363, 369 (1971).[6] I must assume, therefore, that the Act, subject to whatever gloss is provided by the administrative regulations,[7] is capable of applications that would prohibit speech and conduct clearly protected by the First Amendment. Even on the assumption that the statute's regulatory aim is permissible, the manner in which state power is exercised is one that unduly infringes protected freedoms. *Shelton* v. *Tucker*, 364 U. S. 479, 489 (1960); *Cantwell* v. *Connecticut*, 310 U. S. 296, 304 (1940). The State has failed, in other words, to

[6] See also *Niemotko* v. *Maryland*, 340 U. S. 268, 285 (1951) (Frankfurter, J., concurring in the result in *Kunz* v. *New York*, 340 U. S. 290 (1951)): "It is not for this Court to formulate with particularity the terms of a permit system which would satisfy the Fourteenth Amendment."

[7] In addition to the regulations promulgated by the State Personnel Board, the Court places some reliance on an interpretive circular issued by the Board and on certain opinions issued by the State Attorney General. Even assuming that these constructions should properly be considered in gauging the reach of the Act, they offer little real guidance to the meaning of the terms. The circular, for example, states that "The right to express political opinions is reserved to all such persons. Note: This reservation is subject to the prohibition that such persons may not take active part in political management or in political campaigns." See n. 15, *ante*. The second half of that statement merely restates the provision of the Act. The first half can hardly be said to convey any fixed meaning. In fact, given the statement in the Act that the right to make a private expression of political views is protected, an employee might reasonably interpret the circular to mean that "The right to express political opinions is reserved to all such persons, provided that such expression is not made in public." Similarly, the Court makes reference to an Opinion of the Attorney General holding, "in plain terms," *ante*, at 16, that the Act applies only to "clearly partisan activity." I am at a loss to see how these statements offer any clarification of the provisions of the Act.

provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). See *NAACP* v. *Button*, 371 U. S. 415, 433 (1963).

Although the Court does not expressly hold that the statute is vague and overbroad, it does assume not only that the ban on the wearing of badges and buttons may be "impermissible," but also that the Act "may be susceptible of some other improper applications." *Ante*, at 16–17. Under principles that I had thought established beyond dispute, that assumption requires a finding that the statute is unconstitutional on its face. Ordinarily, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).[8] And appellants apparently concede that the State could prohibit the conduct with which they were charged without infringing the guarantees of the First Amendment. Nevertheless, we have repeatedly recognized that "the transcendent value to all society of constitutionally protected expression is deemed to justify

[8] *Raines* concerned a prosecution under § 131 of the Civil Rights Act of 1957, charging that the defendants, in their capacity as state officials, had discriminated against blacks who desired to register to vote. The defendants' conduct plainly fell within the permissible reach of the statute. But more importantly, it was not even suggested that the statute might conceivably be used to punish the exercise of First Amendment rights. While stating the general rule that a defendant normally may not assert the constitutional rights of a person not a party, *Raines* did specifically recognize that the rule is suspended in cases where its application would "itself have had an inhibitory effect on freedom of speech." 362 U. S., at 22. Cf. *United States* v. *National Dairy Corp.*, 372 U. S. 29 (1963); *Yazoo & M. R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217 (1912).

allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding* v. *Wilson*, *supra*, at 521, quoting from *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).[8] We have adhered to that view because the guarantees of the First Amendment are "delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith* v. *California*, [361 U. S. 147, 151–154 (1959)]." *NAACP* v. *Button*, *supra*, at 433. The mere existence of a statute that sweeps too broadly in areas protected by the First Amendment "results in a continuous and pervasive restraint on all freedom of discusion that might reasonably be regarded as within its purview. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940). See Note, the First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–854 (1970).

Although the Court declines to hold the Oklahoma Act unconstitutional on its face, it does expressly recognize that overbreadth review is a necessary means of preventing a "chilling effect" on protected expression. Nevertheless, the Court reasons that the function of the doctrine "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from

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[8] See also *Kunz* v. *New York*, 340 U. S. 290 (1951); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Terminiello* v. *City of Chicago*, 337 U. S. 1 (1949).

'pure speech' towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in mantaining comprehensive controls over harmful, constitutionally unprotected conduct." *Ante*, at 14. Where conduct is involved, a statute's overbreadth must henceforth be "substantial" before the statute can properly be found invalid on its face.

I cannot accept the validity of that analysis. In the first place, the Court makes no effort to define what it means by "substantial overbreadth." We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine. Cf. Note, The First Amendment Overbreadth Doctrine, *supra*, at 858–860, 918. Whether the Court means to require some different or greater showing of substantiality is left obscure by today's opinion, in large part because the Court makes no effort to explain why the overbreadth of the Oklahoma Act, while real, is somehow not quite substantial. No more guidance is provided than the Court's conclusory assertion that appellants' showing here falls below the line.

More fundamentally, the Court offers no rationale to explain its conclusion that, for purposes of overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. Indeed, in the case before us it is hard to know whether the protected activity falling within the Act should be considered speech or conduct. In any case, the conclusion that a distinction should be drawn was the premise of MR. JUSTICE WHITE'S dissenting opinion in *Coates* v. *City of Cincinnati*, 402 U. S. 611, 620–621 (1971), and that con-

clusion—although squarely rejected in *Coates*—has now been adopted by the Court.

At issue in *Coates* was a city ordinance making it an offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Id.*, at 611. There can be no doubt that the ordinance was held unconstitutional on its face, and not merely unconstitutional as applied to particular, protected conduct. For the Court expressly noted that the ordinance was "aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech." 402 U. S., at 616. In dissent, MR. JUSTICE WHITE maintained that since the ordinance prohibited persons from "assembling and 'conduct[ing]' themselves in a manner annoying to other persons," he would "deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on its face and since we have no information on this record as to what conduct was charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core." 402 U. S., at 620–621. Thus, *Coates* stood, until today, for the proposition that where a statute is "unconstitutionally broad because it authorizes the punishment of constitutionally protected

conduct," 402 U. S., at 614, it must be held invalid on its face whether or not the person raising the challenge could have been prosecuted under a properly narrowed statute.[10] The Court makes no attempt to distinguish *Coates*, implicitly conceding that the decision has been overruled.

At this stage, it is obviously difficult to estimate the probable impact of today's decision. If the requirement of "substantial" overbreadth is construed to mean only that facial review is inappropriate where the likelihood of an impermissible application of the statute is too small to generate a "chilling effect" on protected speech or conduct, then the impact is likely to be small. On the other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed. In my view, the principles set forth in *Coates* v. *City of Cincinnati*, are essential to the preservation and enforcement of the First Amendment guarantees. Since no subsequent development has persauded me that the principles are ill-founded or that *Coates* was incorrectly decided, I would reverse the judgment of the District Court on the strength of that decision and hold the Oklahoma Merit Act unconstitutional on its face.

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[10] The Court has applied overbreadth review to many other statutes that assertedly had a "chilling effect" on protected conduct, rather than on "pure speech." See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State*, *supra*; *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). In none of these cases, or others involving conduct rather than speech, did the Court suggest that a defendant would lack standing to raise the overbreadth claim if his conduct could be proscribed by a narrowly drawn statute.